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Supreme Court, U.S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

(3)

NO: 85-5446

BENJAMIN A. BERRY,
PETITIONER

VERSUS

LOUISIANA,
RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT

BRIEF OF THE STATE OF LOUISIANA IN OPPOSITION

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BRIEF OF THE STATE OF LOUISIANA IN OPPOSITION

OPINIONS BELOW

The original state appeal of the Petitioner's first degree murder conviction and death sentence is reported as State v. Berry, 391 So.2d 406 (La. 1980).

The denial of a writ of certiorari by the United States Supreme Court is reported as Berry v. Louisiana, 451 U.S. 1010, 101 S.Ct. 2347, 68 L.Ed.2d 863 (1981).

The denial of habeas relief after a state evidentiary hearing and appeal thereof is reported as State v. Berry, 430 So.2d 1005 (La. 1983).

The denial of habeas relief after a federal evidentiary hearing and appeal thereof is reported as Berry v. King, 765 F.2d 451 (5th Cir, 1985).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

COUNTERSTATEMENT OF QUESTIONS PRESENTED

The issues presented in the instant certiorari petition are:

1. Whether Petitioner was denied the effective assistance of counsel at trial;

2. Whether Petitioner's conviction must be overturned based on juror bias.

STATEMENT OF THE FACTS

(Taken from State v. Berry, 391 So.2d 406 (La. 1980))

The trial revealed the following facts concerning the offense. On January 30, 1978, Benjamin Berry and one David Pennington decided to rob the Metairie Road branch of the Metairie Bank and Trust Company. The pair drove from their apartment in Baton Rouge to the bank in Jefferson Parish. They arrived at approximately 10:00 a.m.. Pennington entered the bank alone to look around, more specifically to see if the tellers had much cash. Pennington returned to the truck where the defendant was waiting and advised him of his findings. It is disputed whether or not Pennington told defendant that there was an armed guard inside the bank. Defendant contends that Pennington did not so inform him, but Officer Lamia testified that defendant had made a statement and told him that he did know there was an armed guard in the bank before he entered. In any event Berry decided to proceed with the robbery. While Pennington waited in the truck, Berry entered the bank, with seven to ten customers inside, with his fifteen round, nine millimeter, "automatic" pistol drawn. The guard, a Jefferson Parish Sheriff's Deputy working a paid security detail, exchanged fire with defendant and was fatally wounded. Berry fired three shots, two hit the officer and one hit the wall about three feet above the floor. The officer fired one shot wounding Berry. Defendant immediately fled from the bank after the shooting and the pair returned to Baton Rouge. Berry was later arrested after entering a Baton Rouge hospital for treatment. Berry was charged with first degree murder. At the trial, Berry argued that he did not have the requisite intent to kill the victim but rather that he shot impulsively in self defense, after being fired upon. The state countered this argument by introducing testimony to the effect that Berry shot first and also fired the fatal shot at close range after the victim had dropped his gun upon first being hit.[1]

---

[1] The jury apparently believed the state's version of the facts, finding that Berry did intentionally shoot the deputy sheriff, since they returned a guilty verdict and since "intent to kill or commit great bodily harm" is an element of the crime of first degree murder. From our own review of the record, we feel that the evidence supports this finding by the jury.

ARGUMENT NO. I

WHETHER PETITIONER WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT TRIAL

In his first ground before this Court, Petitioner wishes to invoke this Court's review on an allegation of ineffective counsel asserted to be of constitutional magnitude.

Specific allegations put forth include an allegation that trial counsel used drugs, failed to adequately investigate and prepare an adequate defense for both the innocence/guilt phase and penalty phase of the trial, stipulated the guilt of the defendant and failed to even put on Petitioner's mother as a witness during the penalty phase of the trial.

Hence, Petitioner claims that because of counsel's drug addiction his trial counsel failed to adequately prepare his defense and furthermore, his trial counsel made a very bare argument for the life of Petitioner during the penalty phase of his trial.

To cite the often repeated performance/prejudice standard used in evaluating all claims of constitutionally ineffective counsel, Strickland v. Washington, ____ U. S. ____, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) states:

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable. Id. 104 S.Ct.at 2064, 80 L.Ed.2d at 693.

Judicial scrutiny of counsel's performance must be highly deferential . . . Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy." Id. at 104 S.Ct. at 2065-66, 80 L.Ed.2d at 694-95.

The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

A "reasonable probability" is defined as a probability sufficient to undermine confidence in the outcome of the case. Id. at ____, 104 S.Ct. at 2068, 80 L.Ed.2d at 698.

The above statements by this Honorable Court form the crux of all or almost all death penalty litigation in the United States.

Decided on the same day, United States v. Cronic, ____ U. S. ____, 104 S.Ct. 2039 80 L.Ed.2d 657 (1984) teaches us that the Court has also found constitutional error without any showing of prejudice when counsel was either totally absent or prevented from assisting the accused during a critical stage of the proceeding. Apart from circumstances of that magnitude however, there is generally no basis for finding a Sixth Amendment violation unless the accused can show how specific errors of counsel undermined the reliability of the finding of guilt.

Considering the record as a whole, the determination to be made in this case is a Strickland one; Cronic is not applicable. Thus, Berry must show specific errors which undermine confidence in his conviction and sentence.

The thrust of Petitioner's argument is twofold.

First, Petitioner alleges that his trial counsel's "use of drugs" or "drug addiction" prevented him from adequately preparing and presenting a defense, both in the innocence/guilt phase and the penalty phase.

While it is true from the record that Mr. Blanche did not subpoena any witnesses for trial, the lengthy passage of time has not enabled Petitioner to provide the names of any witnesses who should have been called, either in the guilt or penalty phase. Furthermore, complaints of an uncalled witness in an effort to demonstrate ineffectiveness are not favored in federal habeas review. Murray v. Maggio, 736 F.2d 279 (5th Cir. 1984); Boyd v. Estelle, 661 F.2d 388, 389 (5th Cir. 1981). Moreover, Petitioner must overcome a strong presumption that his counsel's decision in not calling a witness was a strategic one. Murray, supra.

Testimony in both the state and federal evidentiary hearings shows that Mr. Blanche did interview witnesses. Unfortunately, any witness who could supply anything good about Petitioner would have had to admit the bad facts which Petitioner now downplays. Even assuming that the failure to find out about **Ruth East** was a deficiency in Mr. Blanche's investigation, her testimony, brought forth at the state evidentiary hearing, could not possibly have had the impact suggested by Petitioner. See State v. Berry, 430 So.2d at 1011.

Again, the Strickland prong of prejudice is lacking.

In sum, the trial attorney, after investigation, came to the reasonable conclusion that there were no witnesses who could help his client. State v. Berry, 430 So.2d at 1012. Even the passage of time (seven years) has not allowed Mr. Berry to change this. The Sixth Amendment does not require that counsel do what is impossible or unethical; if there is no bona fide defense to a charge, counsel cannot create one and may disserve the interests of his client by attempting a useless charade. U. S. v. Cronic, id.

In line with the above, another area of complaint relative to ineffective assistance is the alleged failure to call witnesses in the penalty phase. As stated above, the arguments of Petitioner are similar with one twist--Petitioner's mother.

The record clearly shows that Mrs. Berry was placed on the stand in the penalty phase but was overcome by emotion and unable to testify. Despite Berry's request to have his mother removed (Fed. Evid. Transcript, p. 35), Mr. Blanche placed her on the first row of the courtroom so that she would be the last thing the jurors saw before their deliberation. Petitioner's allegation in his brief contending that the above conveyed to the jury that Petitioner's mother would not testify is absurd and unfounded. Instead, it is clear evidence of a good trial attorney using everything he has in court to his client's best advantage.

It has been held that counsel's failure, at the penalty phase of a Louisiana capital case, to put on evidence through defendant's relatives, friends and employers as to defendant's affection for his family and friends, their affection for him, defendant's willingness to work hard and his conscientiousness and dependability and nonviolent disposition, as well as IQ evidence, did not so prejudice defendant as to violate a constitutional right to assistance of counsel. See Celestine v. Blackburn, 750 F.2d 353 (5th Cir. 1984); (Slip opinion No. 84-4745); Willie v. Maggio, 737 F.2d 1372 (5th Cir. 1984).

Accordingly, there is no merit to this allegation.

The most major area of complaint by Petitioner relative to ineffective representation is the allegation that Petitioner's trial attorney used illegal drugs during the representation of Mr. Berry.

Benjamin Berry himself summed it up when he testified at his first evidentiary hearing: he didn't care what was done at trial and, that's why he didn't testify. Yet here, nowhere does he mention on direct or cross examination that his attorney was on illegal drugs during his trial. Although he admits that he received an undesirable discharge from the service and did time in military jail for his drug and A.W.O.L. problems, he, knowing the effects of drugs, oddly chooses not to tell the court about his observations of drug use

by his counsel during his trial. He remembers his counsel drunk at one interview yet fails to even mention anything about this allegation in his testimony.

Instead, he at best shows that on one night during the trial, his counsel spent the night at a friend's house with Winn Dyer, another friend. Upon her return, Mary Beth Alice (Blanche's friend) noticed a disarray of pills near her bathroom. She then yelled at Winn Dyer for making a mess. Mr. Blanche was asleep. The next morning she failed to mention the episode to Mr. Blanche and drove him to his destination. His actions at all times appeared normal. (Fed. Evid. Transcript, pp. 73-80).

QUITE SIMPLY, THIS IS ALL THAT WAS SHOWN. AT NO TIME DID ANYONE EVER SHOW ANY DRUG USE BY MR. BLANCHE AT ANY TIME DURING HIS REPRESENTATION OF MR. BERRY, EITHER AT TRIAL OR ON DIRECT APPEAL TO THE LOUISIANA SUPREME COURT OR THE UNITED STATES SUPREME COURT.

Stacked against this allegation are drug records of Mr. Blanche from 1977 until 1982 which indicate that he never failed a urine test for drugs. Also, witnesses to the original trial including the trial judge, the original prosecutor, an attorney for a co-defendant (Jay Zainey representing Donald Pennington) and even a newspaper reporter who covered the original trial all indicate that Mr. Blanche did an excellent job in his defense, one which is a credit to the legal profession. The record clearly supports this.

Thus, as a finding of fact, the State judge found the allegation of drug use by trial counsel unfounded after an evidentiary hearing.

This finding is entitled to a presumption of correctness. 28 U.S.C. 2254(d); Sumner v. Mata, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1982); Sumner v. Mata, 455 U.S. 591, 102 S.Ct. 1303, 71 L.Ed.2d 480 (1982); Marshall v. Lonberger, ____ U.S. ____, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983); Asper v. Estelle, 709 F.2d 356 (5th Cir. 1983); Germandy v. Estelle, 639 F.2d 1301 (5th Cir. 1981). To overcome the § 2254 presumption, Petitioner must show one of the exceptions listed in § 2254(d). Daigre v. Maggio, 705 F.2d 786, 789 (5th Cir. 1983); Williford v. Estelle, 672 F.2d 552, 553 (5th Cir. 1982). Petitioner here does not urge any particular exception. Nor does a reading of his argument indicate that any of the factors is actually present. The trial judge's reasons are clear and there is ample evidence in the record to support his conclusions. The State respectfully submits that Petitioner has not overcome the § 2254 presumption.

Thus, the State respectfully submits that no new findings of fact can be reached in the federal evidentiary hearing absent a specific finding of exception under 28 U.S.C.A. 2254(d).

Furthermore, the federal district court has affirmed the finding of fact by the state court.

Findings of fact by the district court in habeas corpus cases will not be set aside unless they are clearly erroneous. Fed.R.Civ.P. 52(a); Strickland v. Washington, ____ U.S. ____, 104 S.Ct. 2052, 2070, 80 L.Ed.2d 674, 700 (1984); Gomez v. McKaskle, 734 F.2d 1107, 1109 (5th Cir. 1984); Hernandez v. Estelle, 674 F.2d 313, 315 (5th Cir. 1981); Parnell v. Wainwright, 464 F.2d 735 (5th Cir. 1972).

In addition to the above, the Strickland prong of prejudice has not been met in this regard.

In light of the above, the State must respectfully disagree with the three judge panel's conclusion that the use of drugs during Petitioner's trial was far from settled in either the state or federal evidentiary hearing. Were that even remotely possible, Cronic might be applied.

The second and major thrust of Petitioner's ineffective counsel allegation is a stipulation made by counsel at trial.

Berry's contention is that his trial counsel stipulated to the functional equivalent of a plea of guilty without his consent.

As is plainly evident from the record, this stipulation did not include an essential element of the crime, specific intent to kill. It is clear that this was to be the defense throughout the trial in both phases. Thus, the stipulation was clearly a strategic choice designed to weaken the effect of the most damaging evidence against Berry while allowing him the chance to say he (Berry) didn't shoot first, his only real chance if he had one at all.

Thus, Berry has further failed to identify any prejudice resulting from the stipulation. The record as a whole supports the true nature of the adversarial process at work.

Berry's further assertion that a conflict in this area exists between the Fifth and Sixth and Eleventh Circuits is equally without merit.

Berry cites Francis v. Spraggins, 720 F.2d 1190 (CA11, 1983) and Wiley v. Sowders 647 F.2d 642 (CA6, 1981) as the major support for this premise.

The clear distinction between Berry and the above cases is the stipulation of every element charged in Francis and Wiley and the failure to stipulate specific intent, an element of the crime, in Berry's case. Both counsel in Francis and Wiley made stipulations admitting every element of the ccrime charged in the hopes that they could make a credible argument for the life of the accused. The State respectfully suggests

that because the rulings in the Francis and Wiley cases are essentially factual determinations no "conflict" actually exists between any of the federal circuits. The decisions in the cited cases turn on the effects of the stipulations involved; the decisions cited are "fact bound" in the strictest sense. The State respectfully suggests that mere variations in the results of applications of Strickland do not amount to a "conflict" between the courts of appeal.

On the other hand, Berry's counsel did not stipulate every element (specifically specific intent) so that he could perhaps raise enough doubt in one juror's mind as to who fired first and thereby make an effective plea for Berry's life. Counsel's failure in no way indicates a lack of strategy or effort. Rather, it indicates a plan carried out so that the jury could see everything it could about Berry and his crime and make its judgment accordingly.

In sum, Petitioner has shown no element of his trial counsel's peformance that fell below the constitutional requirement of the Sixth Amendment.

ARGUMENT NO. 2

WHETHER PETITIONER'S CONVICTION MUST BE OVERTURNED BASED ON JUROR BIAS

As his final ground for a stay of execution Petitioner asserts that his conviction is unconstitutional because Louisiana procedure allows a capital defendant to be tried before a "guilt prone" jury. Petitioner argues that procedures which allow the prosecution to excuse death penalty opponents from service at the guilt phase of trial deprive the capital defendant of an impartial jury: Petitioner argues that a "death qualified" jury is predisposed to return a guilty verdict. The State respectfully suggests that Petitioner does not merit relief based on this claim. Because Petitioner has not developed any evidence in support of his claim Petitioner should not be allowed to appeal this issue.

The State first respectfully suggests that Petitioner is barred from raising this claim in these proceedings for the following reasons. The practice of "death qualifying" juries was originally approved by the Supreme Court. Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). More recently however, the Eighth Circuit has found merit to the theory that "death qualified" juries are disproportionately prone to convict at the guilt phase of trial. See Grigsby v. Mabry, 758 F.2d 226 (8th Cir. 1985). A petitioner seeking relief based on this sort of claim, however, has the burden of showing that jurors have been excluded from service based on a Witherspoon-type objection and that the effect of excluding such jurors has been to deprive the petitioner of a fair trial. Sonnier

v. Maggio, 720 F.2d 401, 404 (5th Cir. 1983) (necessity of presenting "factual particulars"). Petitioner has failed to produce any evidence in support of this claim for relief. Petitioner did not produce any evidence whatsoever in support of his proposition that "death qualification" procedures result in a biased jury at the guilt phase of trial. Petitioner did not present either documentation or expert testimony in support of this contention at the district court hearing.

Petitioner has also failed to show that "death qualified" juries are unreliable arbiters of guilt by his failure to put any evidence on these issues before the district court. The State therefore respectfully suggests that Petitioner has abandoned this claim. Sellers v. Smith, 412 F.2d 1002, 1004 (1969). Petitioner should not now be able to raise this claim. Moreover, the State respectfully suggests that, even had this issue been properly developed, Petitioner has not shown that he is entitled to relief based on this claim.

The Fifth Circuit has consistently denied relief to applicants urging this claim. Mattheson v. King, 751 F.2d 1432, 1442 (5th Cir. 1985); Willie v. Maggio, 737 F.2d 1372, 1385 (5th Cir. 1984); Smith v. Balckom, 660 F.2d 573 (5th Cir. Unit B 1981); Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978). It has recently held that the decision to institute a bifurcated jury for capital cases is one strictly within the legislative purview. Knighton v. Maggio, 740 F.2d 1344, 1351 (5th Cir. 1984). Further, though Petitioner points to a judicial decision implementing such a rule, the Grigsby rule is so far the only such one. The requirement of a bifurcated jury has recently been rejected in two other federal circuits. See Keeton v. Garrison, 742 F.2d 129 (4th Cir. 1984); McClesky v. Kemp, 753 F.2d 877, 901 (11th Cir. 1985). Hence, any Grisby type claim Petitioner may have is without merit.

Furthermore, Petitioner is not only not entitled to relief but also not entitled to a stay since the State used fewer than its allowed number of peremptory challenges, contrary to the conclusions found in the Louisiana Supreme Court Opinion State v. Berry, 391 So.2d 406 (La.1980) and the Fifth Circuit Opinion Berry v. King, 768 F.2d 451 (1985).

The minute entry from the voir dire, Exhibit A, lists eight prospective jurors as peremptorily challenged by the State. The transcript of the voir dire (Exhibit B) supports that these jurors were indeed challenged although the reasons for the challenges are often vague. But after the voir dire was completed the judge excused the sworn jurors and noted for the record the basis for the challenges:

> "For the record, counsel and the Court agreed to allow the reasons for the challenges to be done privately at the bench, but the court has permitted the challenges of Mr. Donahue, Mr. Forest, Mr. Ferrand, Miss McMillan, Miss

Lyons, Miss Burks, and Mr. Schiro to be for cause in view of the Witherspoon ruling. The other challenges were peremptory."

(Voir Dire Transcript, page 143)

The transcript of the voir dire supports the fact that each of these jurors qualified as a Witherspoon excludables (although the minute entry for Helen McMillan lists her as a peremptory challenge the record supports the judge's statement that she was excluded for cause). Nevertheless, according to the minute entry the State used eight (8) peremptory challenges but according to the judge and the transcript the State only used seven peremptory challenges. Hence, the State had four or five peremptory challenges remaining out of twelve allowed by Louisiana statute. Under La.C.Cr.P. art. 800, the defendant does not have ground for such a complaint if the state uses fewer than the number of peremptory challenges to which it is entitled. State v. Jackson, 450 So.2d 621 (La. 1984). Presumably the jurors challenged for cause as WEs were within reach of peremptory challenges and Petitioner is insulated from any improper influences a death qualified jury may have had on Petitioner's conviction and sentence. Sonnier v. Maggio, 720 F.2d 401, 406 (5th Cir. 1983); Jordan v. Watkins, 681 F.2d 1067, 1070 (5th Cir. 1982). The conviction and sentence of Petitioner are not vulnerable where the maximum number of peremptory challenges was not used or exceeded unless some juror was improperly excused for cause under Witherspoon. Davis v. Georgia, 429 U.S. 122, 97 S.Ct. 399, 50 L.Ed.2d 339 (1976); O'Bryan v. Estelle, 714 F.2d 365, 371 (5th Cir. 1983); Burns v. Estelle, 592 F.2d 1297, 1300 (5th Cir. 1979). A review of the transcript in this case reveals that no juror was improperly excused for cause based on an objection to the death penalty. The State suggests that Petitioner's conviction and sentence should not be reversed based on this ground.

The State finally suggests that Petitioner does not merit a stay of execution based on this ground for relief. As noted above, Petitioner has not shown that he is entitled to relief. Further, the decision by the United States Supreme Court to review this issue does not require that Petitioner be granted a stay automatically. See Witt v. Wainwright, 53 U.S.L.W. 3647 (11th Cir. 1985).

CONCLUSION

FOR THE FOREGOING REASONS, IT IS RESPECTFULLY SUBMITTED THAT THIS PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED AND THAT A STAY OF EXECUTION SHOULD NOT BE GRANTED.

Respectfully Submitted,

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CERTIFICATE

I, William C. Credo, III, a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 10th day of December, 1985, I served three copies of the brief in opposition on each of the parties thereto, as follows:

1. On Petitioner, Benjamin Berry, through his counsel of record, Samuel DAlton, 2001 Jefferson Highway, Jefferson, Louisiana 70121.

IT IS FURTHER certified that all parties required to be served have been served, and that the list of such parties is as set forth above.

William C. Credo III
WILLIAM C. CREDO, III

EXHIBIT "A"

DISTRICT COURT MINUTES

JURY SELECTION

STATE OF LOUISIANA, PARISH OF JEFFERSON

24th Judicial District Court

State of Louisiana

vs. No. 78-2151

BENJAMIN A. BERRY Division "B"

Date 10-24-78

DISTRICT ATTORNEY G. K. KONRAD / P. C. LEITZ JUDGE F. V. ZACCARIA

THE DEPENDANT BERRY APPEARED BEFORE THE BAR OF THE COURT THIS DAY. HE WAS REPRESENTED BY FRED A. BLANCHE, III, ATTORNEY.

THE COURT TOOK UP THE MOTION FOR APPOINTMENT OF A SANITY COMMISSION:

W. --- DR. E. T. FRANK, M.D. (STIPULATION AS TO EXPERTISE IN THE FIELD OF PSYCHIATRY)

MATTER HEARD - ARGUED - SUBMITTED - BY ORDER OF THE COURT, THE MOTION TO APPOINT A FULL-BLOWN SANITY COMMISSION IN THIS MATTER IS DENIED - OBJECTION NOTED BY MR. BLANCHE TO THE COURT'S RULING.

MOTION FOR INDIVIDUAL VOIR DIRE AND SEQUESTRATION OF JURORS DURING VOIR DIRE TAKEN UP - ARGUED - SUBMITTED - MOTION DENIED BY THE COURT - OBJECTION NOTED BY MR. BLANCHE TO THE COURT'S RULING.

MR. BLANCHE FILED THIS DAY A MOTION TO RECUSE JUDGE ZACCARIA IN THIS MATTER. THE MOTION TO RECUSE WAS TAKEN UP WITH JUDGE LOUIS G. DESONIER, DIVISION "A" OF THIS COURT, PRESIDING. MOTION TO RECUSE ARGUED - SUBMITTED - DENIED BY THE COURT.

JOINT STIPULATION OF COUNSEL THAT ALL MOTIONS AND ANSWERS OF THE OTHER INDICTMENTS BE INCORPORATED INTO THIS CASE.

AT THE HOUR OF 4:17 P.M. THE COURT TOOK UP MATTER #78-2151
ENTITLED STATE OF LOUISIANA (vs) BENJAMIN A. BERRY
R. S. 14:30 - FIRST DEGREE MURDER
PRESENT WERE:
BENJAMIN A. BERRY - DEFENDANT
FRED A. BLANCHE, III - COUNSEL REPRESENTING THE DEFENDANT
PATRICK C. LEITZ - COUNSEL REPRESENTING THE STATE OF LOUISIANA
GORDON K. KONRAD - CO-COUNSEL REPRESENTING THE STATE OF LOUISIANA

THE JURY SELECTION IN THIS MATTER BEGAN:
STEVEN LEE TAILLOCK - PEREMPTORILY CHALLENGED BY THE DEFENSE
HELEN ALBEANISE TRIGO - A C C E P T E D
PAUL MAROTTE - PEREMPTORILY CHALLENGED BY THE STATE
JERRAL JOSEPH ANDRY - A C C E P T E D
CATHERINE BRUMFIELD RAYMOND - PEREMPTORILY CHALLENGED BY THE DEFENSE
HARRIS MUNROE PERRY - A C C E P T E D
LOUIS MICHAEL DONAHUE - CHALLENGED FOR CAUSE BY THE STATE - GRANTED
ALCIDE JOSEPH TRUDEAUX - PEREMPTORILY CHALLENGED BY THE STATE
MILDRED CLAIRE BISHOP - A C C E P T E D
DORIS CHARLES FORGES - PEREMPTORILY CHALLENGED BY THE STATE
ELIZABETH HOMER BORDELON - A C C E P T E D
ELIZABETH D'ANN ALLEN - A C C E P T E D

STATE OF LOUISIANA, PARISH OF JEFFERSON

24th Judicial District Court

State of Louisiana

VS.

BENJAMIN A. BERRY

No. 78-2151

Division "B"

Date 10-24-78

DISTRICT ATTORNEY G. K. KONRAD / P. C. LEITZ JUDGE P. V. ZACCARIA

RICHARD LOGAN TUCKER - A C C E P T E D
PAUL LLOYD PLUSQUELLEC - EXCUSED BY THE COURT FOR CAUSE
FRANCES BEATRICE SOFIA - PEREMPTORILY CHALLENGED BY THE STATE
CAROLYN ANN LAROSE - A C C E P T E D
DOROTHY WILLIAMS - A C C E P T E D
BURTIS DAVID CARTER, SR. - PEREMPTORILY CHALLENGED BY THE STATE
PHILIP MELVIN FERRAND - CHALLENGED FOR CAUSE BY THE STATE - GRANTED
CHARLES RUSSELL TODARO - PEREMPTORILY CHALLENGED BY THE DEFENSE
FRANK WATKINS SHERMAN - A C C E P T E D
SIDNEY JOSEPH FOREST - CHALLENGED FOR CAUSE BY THE STATE - GRANTED
LUVERNE VOS JAMES - CHALLENGED FOR CAUSE BY JOINT CONSENT OF COUNSEL
HELEN MCMILLAN - PEREMPTORILY CHALLENGED BY THE STATE
ELIZABETH LUEHRMANN BUCHANAN - A C C E P T E D
G. T. RINALDI - PEREMPTORILY CHALLENGED BY THE DEFENSE
DORIS K. MUHL - PEREMPTORILY CHALLENGED BY THE STATE
ORELIA JOSEPHINE LYONS - CHALLENGED FOR CAUSE BY THE STATE - GRANTED
WILLIAM A. RHEA, JR. - PEREMPTORILY CHALLENGED BY THE DEFENSE
GEORGIA MARIE WILLIS - PEREMPTORILY CHALLENGED BY THE STATE
VIOLA LEE BURKS - CHALLENGED FOR CAUSE BY THE STATE - GRANTED
FRANK PAUL SCHIRO - CHALLENGED FOR CAUSE BY THE STATE - GRANTED
DANIEL PAUL DUFRENE - A C C E P T E D
ELMER JAMES KINABREW - CHALLENGED FOR CAUSE BY THE STATE - GRANTED
JOHN H. LINK - A C C E P T E D - ALTERNATE JUROR

SELECTED JURORS:
HELEN ALBEANISE TRIGO
JERRAL JOSEPH ANDRY
HARRIS MUNROE PERRY
MILDRED CLAIRE BISHOP
ELIZABETH HOMER BORDELON
ELIZABETH D'ANN ALLEN
RICHARD LOGAN TUCKER
CAROLYN ANN LAROSE
DOROTHY WILLIAMS
FRANK WATKINS SHERMAN
ELIZABETH LUEHRMANN BUCHANAN
DANIEL PAUL DUFRENE
JOHN H. LINK - ALTERNATE

AT THE HOUR OF 7:30 P.M. COURT RECESSED FOR THE DAY. COURT RECESSED UNTIL 9:30 A.M. ON 10-25-78.

THE DEFENDANT WAS REMANDED TO PARISH PRISON.

Pete Fitzgerald, Jr.
DEPUTY CLERK

Entry No. 3

EXHIBIT "B"

VOIR DIRE TRANSCRIPT

+29 Vol II & III

bring whatever belongings you need and we'll help you in any way we can. Possibly tomorrow night we expect that by the next day after that the case should be terminated. These are guesses, of course, but don't hold me to it.

I will try to explain to you that are selected the various steps that we take as we go along. After a jury is selected I will give them some of the things that might help them in sitting here and listening to the evidence in the case without me commenting on the evidence. I'm not allowed to do that.

I want you jurors who are not called here to pay attention to the answers and questions that are given because you may be asked those same questions and you might be able to save some time if you know exactly what's going on in the courtroom and what's expected. What we're expecting is to pick a jury that is going to sit in that jury box and give both the State and the defendant a fair trial based on the evidence that is heard and the exhibits that are offered in evidence.

Gentlemen, do you have any particular procedure for selecting the alternate? I'm willing to abide by whatever you want

to do. Shall we select twelve jurors and then select an alternate?

MR. BLANCHE:

Yes, sir.

THE COURT:

All right. Let's call twelve jurors to the stand. As you are called please fill up the front row.

THE CLERK:

Steven Tadlock, Helen Trigo, Paul Marotte, Jerral Andry, Catherine Raymond, Harris Perry, Louis Donahue, Alcide Trudeaux, Mildred Bishop, Doris Forges, Elizabeth Bordelon, Elizabeth Allen.

(Whereupon, the voir dire oath was administered by the Clerk.)

THE COURT:

Ladies and gentlemen, I'm going to introduce you to the people seated at the counsel table. Starting from the man seated nearest to you is Mr. Patrick Leitz, who is an Assistant District Attorney assigned to this division, Mr. Gordon Konrad, who is also an Assistant DA, who also has jurisdiction in this Court. Seated next to Mr. Konrad is the defendant, Benjamin A. Berry. His attorney, Mr. Fred Blanche, III, is seated next to him. The young lady seated next to him

is Mr. Blanche's secretary...assistant.

Do you know anybody seated at the counsel table?

The defendant is accused of a crime of first degree murder, which is alleged to have occurred on January the 30th, 1978 in the Parish of Jefferson, and more specifically in the Metairie Bank. Do you know anything at all about this case? Do any of you know anything that you think I should know? Do you have any preconceived ideas at all about this case or what you should do here in this courtroom? Do you feel that you could sit here and listen to the evidence for the next day... two days and decide the case fairly and impartially based upon the evidence you will hear in the courtroom, and the law as I will instruct you, could you do that?

All right, I'm going to let the attorneys ask you some questions.

BY MR. LEITZ:

Q Mr. Tadlock, how old are you?

A Twenty-one.

Q Are you married?

A No, sir.

Q Where are you employed?

A I work for my brother...Bayou Barge in Marrero.

Q What do you do there?

A I'm manager.

Q How long have you been there?
A We opened up in April.
Q What did you do, sir?
A I was in the U. S. Navy.
Q How long were you in the Navy?
A Two years.
Q How long have you lived in Jefferson Parish?
A Since 1964.
Q Mr. Tadlock, have you or anybody in your family ever been charged with a serious crime?
A No, sir.
Q Mrs. Trigo, how old are you?
A Forty-nine.
Q Are you married?
A Yes.
Q Any children?
A Five children.
Q What's the oldest?
A He's twenty.
Q Does he have any children?
A No.
Q What's the youngest?
A Twelve.
Q Do you work?
A I work part-time at Maison Blanche.
Q How long have you been working there?
A Two years.
Q How long have you lived in Jefferson Parish?
A Nineteen years.

Q Have you or any member of your family been charged with a serious crime?

A No, sir.

Q Have they ever been a victim of a serious crime?

A No.

Q Mr. Marotte, how old are you?

A Thirty-one.

Q Are you married?

A Yes, I am.

Q Any children?

A One little girl four years old.

Q Where are you employed?

A South Central Bell.

Q How long have you been with South Central Bell?

A Thirteen years.

Q How long have you lived in the Parish?

A About seven years.

Q Have you or any member of your family ever been charged with a serious crime?

A Yes, I had a brother that was charged with a crime but I don't even know what it was.

Q Would that factor have any bearing on any decision in this matter?

A None whatsoever.

Q Have you or any member of your family ever been a victim of a serious crime?

A I believe he was convicted.

Q Has anybody been a victim of a crime?

A Oh, a victim, I'm sorry. No.

Q Mr. Andry, how old are you?

A Thirty-eight.

Q Married or single?

A Married.

Q Any children?

A No.

Q Are you employed, sir?

A For Louisiana Power & Light.

Q How long have you been with them?

A About thirteen years.

Q How long have you lived in the Parish?

A Since '69.

Q Have you or any member of your family ever been charged with a serious crime?

A No.

Q Have they ever been a victim of a serious crime?

A No.

Q Miss Raymond, how old are you?

A Thirty-seven.

Q Are you married or single?

A Widowed.

Q Any children?

A One.

Q Boy or girl?

A Girl...twenty.

Q Are you employed, ma'am?

A No.

Q How long have you lived in Jefferson Parish?

A Um, twelve years.

Q Have you or any member of your family ever been charged with a ser.ous crime?

A No.

Q Have you ever been a victim?

A Ah, I was in a bank at one time and it was held up.

Q Would that factor have any bearing on your decision in this matter?

A No.

Q Mr. Perry, how old are you?

A Sixty-six.

Q Married?

A Yes, sir.

Q Any children?

A I have two. The boy is married and the girl lives at home.

Q Any grandchildren?

A No, sir.

Q Are you employed, sir?

A No, sir. I'm retired. I retired last year.

Q Where did you retire from?

A From Touro Infirmary.

Q What did you do there?

A I was a foreman painter there.

Q How long were you with Touro?

A Nine and a half years.

Q How many years have you lived in the Parish?

A Twenty-six years.

Q Have you or any member of your family ever been charged with a serious crime?

A No, sir.

Q Have y'all ever been a victim of a serious crime?

A No, sir.

Q Mr. Donahue, how old are you?

A Fifty-four.

Q Are you married or single?

A Married.

Q Any children?

A Five.

Q What's the oldest?

A Thirty-two.

Q What's the youngest?

A Sixteen.

Q Any grandchildren?

A Four.

Q Are you employed, sir?

A Yes, I work for Metairie Ford.

Q What do you do for Metairie Ford?

A I'm a parts man.

Q How long have you been with Metairie Ford, sir?

A About eight years.

Q How long have you lived in the Parish?

A Since 1958.

Q Have you or any member of your family ever been charged with a serious crime?

A No.

Q Have you ever been a victim of a serious crime?

A No.

Q Mr. Trudeaux...

MR. DONAHUE:...

Wait just a minute. My daughter was attacked by a purse snatcher.

Q Mr. Trudeaux, how old are you?

A Thirty-three.

Q Married or single?

A Married.

Q Any children?

A Four.

Q What are their ages?

A Thirteen, twelve, ten, seven months.

Q Where are you employed at?

A Avondale.

Q What do you do for Avondale?

A I'm a painter.

Q How many years have you been there?

A Two and a half years.

Q How many years have you lived in the Parish?

A All my life.

Q Have you or any member of your family ever been charged with a serious crime?

A No.

Q Have they ever been a victim of a serious crime?

A My sister has.

Q What kind of crime was that?

A She has a nightclub and it was robbed.

Q Would the fact that your sister was robbed have any bearing on your decision in this matter?

A No.

Q Miss Bishop, how old are you?

A Fifty-one.

Q Married?

A Yes.

Q Any children?

A Two children. One married, one single.

Q Is your married child a boy or a girl?

A My daughter is married and I have three grandchildren.

Q Are you employed, ma'am?

A No.

Q How long have you lived in the Parish?

A Eighteen years this month.

Q Have you or any member of your family ever been charged with a serious crime?

A No.

Q Have you ever been a victim of a serious crime?

A No.

Q Miss Forges, what is your age?

A Forty-three.

Q Married or single?

A Married.

Q Any children?

A Yes, six.

Q Six?

A Uh-huh.

Q What's the oldest and the youngest?

A Twenty-three and twelve.

Q The one twenty-three, is that a boy or a girl?
A A boy.
Q Is he married?
A Yes.
Q Are you employed, ma'am?
A Yes, I work part-time as a secretary for Jefferson Parish School Board.
Q How long have you been working for them?
A Three years.
Q How long have you lived in Jefferson Parish?
A Five years.
Q Have you or any member of your family been charged with a serious crime?
A No.
Q Have you ever been a victim of a serious crime?
A No.
Q Miss Bordelon, how old are you?
A Forty-six.
Q Married or single?
A Married.
Q Any children?
A Four sons. And the oldest is married.
Q What is his age, ma'am?
A Twenty-three.
Q Are you employed, ma'am?
A Part-time. I work with my husband.
Q What does he do?
A A retail (inaudible response).
Q How long have you been working with that?

A About eight or nine years.

Q How long have you lived in Jefferson Parish?

A Thirty-eight years.

Q Have you or any member of your family ever been charged with a serious crime before?

A No.

Q You ever been a victim of a serious crime?

A No.

Q Miss Allen, what is your age?

A Twenty-four.

Q Married or single?

A Single.

Q Are you employed?

A Montalbano Advertising.

Q How long have you been with them?

A Four years.

Q How long have you lived in the Parish?

A Twelve years.

Q Have you or any member of your family ever been charged with a serious crime?

A No.

Q Have you ever been a victim of a serious crime?

A No.

MR. LEITZ:

Ladies and gentlemen, I'm going to read to you just exactly what the first degree murder statute is. This is what we're presented here with today.

"First degree murder is the killing of a

human being: (1) When the offender has a specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated rape, or armed robbery; or (2) when the offender has specific intent to kill or to inflict great bodily harm upon a fireman or a peace officer who was engaged in performance of his lawful duties; or (3) when the offender has a specific intent to kill or to inflict great bodily harm and has previously been convicted of an unrelated murder, or is serving a sentence; or (4) when the offender has a specific intent to kill or to inflict great bodily harm upon more than one person; (5) when the offender has a specific intent to commit murder and has been offered or has received anything of value for commiting the murder.

It says "For the purpose of paragraph 2 herein peace officers shall be defined in and include any consequent sheriff, deputy, local or state policemen, game warden, federal law enforcement officers, jail or prison guards, parole officers, probation officers, judges, district attorneys, assistant district attorneys or attorneys who investigate."

In this matter you will be faced with: First, the proposition where you have to render a verdict of guilty or not guilty, or guilty of a lesser verdict. If you come back with guilty, you have a charge, and you will go out and deliberate on whether or not to give the death sentence. That will be determined by the aggravating circumstances. The following shall be considered aggravating circumstances in this matter: a) the offender was engaged in the perpetration or attempted perpetration of aggravated rape, aggravated kidnapping, aggravated burglary, or armed robbery; b) the victim was a fire or peace officer engaged in his lawful duties;

MR. BLANCHE:

Your Honor, I believe that Mr. Leitz is reading the wrong statute to the jury.

MR. KONRAD:

These are the mitigating statutes... I mean, the aggravating circumstances under 905.4.

MR. BLANCHE:

Well, when he read the first degree murder...

MR. KONRAD:

These have actually been incorporated.

MR. BLANCHE:

... definition. I think he read it from the part that had not been amended. I believe the first degree murder definition in the '78 pocket part to the criminal code...

THE COURT:

Go off the record.

(Bench discussion.)

THE COURT:

For the record, after a bench conference, Mr. Leitz, you're permitted to instruct the jury on the evidence in the definitions.

MR. LEITZ:

In order for you to convict upon first degree murder; first degree murder is the killing of a human being when the offender has a specific intent to kill or to bring great bodily harm. You also have to find one or more of the following aggravating circumstances; a) the offender was engaged in the perpetration or attempted perpetration of an aggravated rape, aggravated kidnapping, aggravated burglary, or armed robbery; b) the victim was a fireman or peace officer engaged in his lawful duty; c) the offender knowingly created a risk of death or great bodily harm to more than one person; d) the offender offered or has been offered or has received or has

given or has received anything of value for the commission of the offense. Given the set of facts that you will be given facts from the witness stand, you will take the law from the Judge. If the State proves to you ... we're not asking you this particular case because you haven't heard the facts and you don't know anything about this particular case...would you be able to come back and give the death sentence if you found the evidence to be and the law according to the Judge, do any of y'all feel that under any circumstances whatsoever you could come back and give the death penalty?

Q Mr. Tadlock?

A I couldn't render the death penalty.

Q Miss Trigo?

A I don't know.

Q You don't know whether under any circumstances you could or you couldn't?

A Ah, depending on the circumstances. The question was "Could I come back and give the death penalty?" I guess it depends on the circumstances.

Q If the State proved to you all of the elements of the crime and proved to you the aggravating circumstances, and you took these aggravating circumstances and weighed them

against the mitigating circumstances given you by the defendant, could you then weigh the decision and come back with a guilty verdict or a death penalty?

A Yes, I believe I could.

Q Mr. Marotte?

A I believe I could.

Q Mr. Andry?

A Yes.

Q Miss Raymond?

A Yes.

Q Mr. Tadlock?

A Yes.

Q Mr. Donahue?

A No.

Q Under no circumstances or whatever the State proved to you and what the law was, you could not render a death sentence?

A No.

Q Mr. Trudeaux?

A (Affirmative response.)

Q Miss Bishop?

A I will try to be as honest as I could, yes.

Q You think that if the circumstances were presented...

A After I heard the circumstances I would try to be fair.

Q Miss Bishop?

A I'm Miss Bishop.

Q I'm sorry. Miss Forges?

A I really don't.

Q Miss Forges, after listening to all of the evidence that's presented and on behalf of the State on any mitigating circumstances given by the defendant or by the defense counsel witnesses, would you be able to take that evidence and apply the law and if you could so render a death penalty?

A I think so.

Q You think so. Miss Bordelon?

A Yes.

Q Miss Allen?

A Yes.

Q Do any of y'all have any problems for giving both the State and the defendant a fair trial?

A (Inaudible response.)

Q Do you know of any medical or physical reason why you cannot serve on this jury and devote your full attention to the evidence presented to you?

MR. ANDRY:

I have epilepsy but it's controlled by medication.

Q Do you think that this would interfere with you sitting here at all?

MR. ANDRY:

As long as I have my medicine.

MR. LEITZ:

I tender the panel.

THE COURT:

To reassure any of you prospective jurors, we try to take your comfort into consideration. If any of you are selected if you would like a short recess, all you have to do is...you don't have to sit there and suffer. We'll try to accommodate you. All right?

You tender the jury at this time?

MR. LEITZ:

We tender the panel.

MR. BLANCHE:

May it please the court, Mr. Leitz, once again, ladies and gentlemen, my name is Fred Blanche. I defend the defendant in this case, Ben Berry. Cheryl is my secretary and a paralegal in my office and will be with me throughout the duration of the selection to be on this jury.

Now, you've been read the definition of first degree murder. I would like to read once again to you the legislative definition of it as I appreciate it. It's found in our criminal code, paragraph 30. It's very simple...at least at first glance. It says: "First degree murder is the killing of a human being when the

offender has a specific intent to kill or to inflict great bodily harm." There is a second section of that statute. It states that whoever permits the crime of first degree murder shall be punished by death or life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence in accordance with the recommendation of the jury. That last clause is very important because the outcome of this case, that is, assuming that Ben Berry is convicted of first degree murder, and there are other possibilities that will be explained to you as you go along. Briefly, it will be within your power to convict of first degree murder, second degree murder, or manslaughter.

I'm going to tell you now...of course, you will hear it in our opening arguments ...that no contention is going to be made that Ben Berry is innocent. The contention will be made though that he is not guilty. The contention will be made that he is not guilty of first degree murder. There are other possibilities. I'll explain them and view them many times throughout the course of this trial, but because it is within your power to convict him of first degree murder, it will also

be up to you to decide, assuming that conviction is obtained of first degree murder. It will be up to you to decide whether he is to be electrocuted to death or whether he is to spend his natural life in prison. That's a pretty weighted duty that's being loaded on you if you're selected on the jury. Now, I'm going to ask some questions and so that we can not take up too much time, I'll ask the questions generally. Then, I'll go down and ask each of you to respond to the question that I've asked.

Q If Ben Berry is found guilty of first degree murder, knowing that the law gives you an option of determining what the state will be, I want to know if any of you simply because he was convicted of first degree murder would automatically vote for the imposition of the death penalty...electrocution as opposed to spending his natural life in prison? You'll have to make that choice. So, given a question, Mr. Tadlock, do you have a...

A Yes, sir. It depends on the evidence.

Q It depends on the evidence. Miss Trigo?

A It would depend on the evidence.

Q It would depend on the evidence. Mr. Marotte?

A It would depend on the evidence.

Q Mr. Andry?

A Given proof, I would definitely vote on a death penalty.

Q Sir?

A I would vote the death penalty.

Q You would vote the death penalty?

A If the evidence proves it.

Q If the evidence proves it?

A Yes.

Q If the evidence proves that he was guilty of first degree murder, you would only be able to vote for the death penalty?

A Right.

Q And you cannot consider the alternative; which is to sentence him to prison for the rest of his natural life?

A (Inaudible response.)

Q Miss Raymond?

A Yes, I can.

Q Mr. Perry?

A I'm Mr. Donahue.

Q You're Mr. Donahue?

A Yes, sir.

Q Excuse me. What would be your position, Mr. Donahue?

A I can't vote on a death penalty.

Q Under any circumstances?

A No, sir.

Q Well, Mr. Donahue, let me ask you this: Can you conceive of a set of circumstances...

mass murder, for example...or some particularly brutal crime say perpetrated against someone in your own family...

MR. KONRAD:

Wait a minute. I think that's going much too far.

MR. LEITE:

Your Honor, I think it's going way beyond the scope when he goes into the man's personal family.

THE COURT:

All right. Rephrase your question.

Q Certainly you think of a set of circumstances involving a murder that would enable you to consider the imposition of the death penalty?

A No, sir.

Q Absolutely not?

A No.

Q Thank you.

You're Mr. Trudeaux?

A Yes.

Q Mr. Trudeaux, what is your response to the question I first asked?

A It depends on the evidence.

Q Miss Bishop?

A It would depend on the evidence but I want to know one question: Would this decision have to be unanimous or is it eight - four

A No, ma'am. First of all, to convict Ben Berry of first degree murder you're required the unanimous...

A That's what I mean.

Q ... vote. Then, there will be a sentencing phase after the trial phase and it will once again require that all twelve of you agree that he be electrocuted or that there could be a death penalty.

Q Miss Forges?

A It would depend on the evidence.

Q Miss Bordelon?

A It would depend on the evidence.

Q Miss Allen?

A It would depend on the evidence.

Q The next question, and I want to go down the line just as we've begun, I want to know if you understand if you are instructed by the Judge that a life sentence can be returned regardless of the evidence, do you think you can accept that as a principle of law to guide you in this case? I'll rephrase it. I've told you and I'm suggesting that the Judge will instruct you that regardless of the evidence it is within your power to vote for a sentence of life imprisonment. Do you understand that? Miss Trigo?

A Yes.

Q Mr. Merotte?

A Yes.

Q Miss Raymond?

A Yes.

Q Mr. Perry?

A Yes.

Q Mr. Donahue?

A Yeah...I didn't understand the question.

Q All right. Do you understand that regardless of the evidence it is within your power of a juror to vote for any or either of the two things that are permitted under the first degree murder statute? Do you understand that you can vote for life imprisonment as opposed for the death penalty?

A Yeah. I could do that.

Q Mr. Trudeaux?

A Yes.

Q Mrs. Bishop?

A Yes.

Q Miss Forges?

A Yes.

Q Miss Bordelon?

A Yes.

Q Miss Allen?

A Yes.

Q A few more brief questions. This is going to get very tiring for all of you but it's something that we have to do in order to assure that everybody, the State and the

defense, gets a fair trial as possible.

I think that I pointed out to you that a death sentence of vote to impose the penalty of death must be unanimous. All of you must agree. One of you can keep that from happening. So I don't have down the list of names I'll just have to start with Mr. Tadlock and ask you if you understand that that is the case. A nod will be sufficient.

A (Affirmative response.)

MR. BLANCHE:

You will be instructed during the course of this case and you'll be informed by me and possibly by Mr. Leitz that there're certain principles of law that must apply to the situation: principles that having taken your oath as jurors must be followed. The first that I would like to bring to your attention and ask you if you understand it is that there are various grades of guilt. Of course, in any given trial situation there is also a possibility that the defendant will be found innocent. There is in our law a presumption that the defendant, when he entered this courtroom and we began this trial is innocent. The mere fact that he has been indicted by a Grand Jury is not to sway you. You are to

be here at the beginning of this trial with no real opinion. It is not to be fixed. The presumption is until it's been rebutted by evidence that the defendant, that Ben Berry, is innocent of not only first degree murder or second degree murder but of the crime.

Q Do you understand and would you be able to afford the defendant the presumption of innocence that is incorporated into our law? Mr. Tadlock?

A Yes.

Q All right. Miss Trigo?

A (Affirmative response.)

Q Miss Marotte?

A (Affirmative response.)

Q Mr. Andry?

A (Affirmative response.)

Q Miss Raymond?

A (Affirmative response.)

Q Mr. Perry?

A Would you give me that question again?

Q I'm just saying what's basic in our law and that is that specifically because the defendant a man is here at thim counsel table and has been charged with a crime and indicted, will you give him at least at the beginning of this trial a presumption of innocence?

A Yes.

Q Mrs. Donahue?

A (Affirmative response.)

Q Mr. Trudeaux?

A (Affirmative response.)

Q Miss Bishop?

A (Affirmative response.)

Q Miss Forges?

A (Affirmative response.)

Q Miss Bordelon?

A (Affirmative response.)

Q Miss Allen?

A (Affirmative response.)

Q The second principle of law that I would like to ask you, if you can understand what's been brought to your attention, don't be offended when I say if you can understand because many of us who view with it day in and day out don't fully understand much of the law that we work with on a daily basis, so I don't mean to offend you by guessing that you might not understand it but I just have to ascertain it that you do and understand what is going to be critical to the conduct of this trial. In our law there is a requirement that the State not only prove its case beyond a reasonable doubt and to a moral certainty but that it prove each and every element of the case beyond a

reasonable doubt and to a moral certainty. For example, the crime of murder there are various types of murder. We'll require proving, for example, that someone was actually murdered. They have to prove that there was a death. That's one element of first and second degree murder.

Another element, and I think that it will be of great, great importance during the course of this trial, is that the State must prove beyond a reasonable doubt and to a moral certainty that the defendant have a specific intent to either kill or commit great bodily harm.

I want you to think about the words "specific intent" because that's critical to the State's case. I'd like to read to you of our statute of specific intent, and I'd like to remind you once more that this is perhaps the most critical process of this trial. In our criminal code, Paragraph 10, they define criminal intent. It says, "Criminal intent may be specific or it may be general." We're dealing critically in this case with specific intent.

This is what specific criminal intent is and this is what the state must prove beyond a reasonable doubt: "Specific criminal intent is that state of crime

which exists when the circumstances indicate that the offender actively desired in prescribed criminal consequences to follow his act or failure to act." Let me read it one more time and believe me, you'll hear it again: "Specific criminal intent is that state of crime which exists when the circumstances indicate that the offender actively desired to prescribed criminal consequences to follow this act or failure to act."

Now, I'd like to start and dispense with the names once again and ask you to nod in affirmation or negation if you generally understand what I've read to you about specific criminal intent.

Sir?

A (affirmative response from all jurors.)

Q If you have any questions about this, ask me now because this is as critical a portion of this trial as it can be.

By the way, the portion of this trial a voir dire examination. I don't know why they use foreign words but loosely translated from French it means to tell the truth. We're asking you to really kind of bare your souls and tell us a whole lot about you that we have no right to know except for the fact that we're all here

under a very serious trying circumstance.

One more thing I want to bring to your attention and I'll sit down for a little while. I'd like to ask each of you...

A JUROR:

Does specific intent cover knowing that he may have killed someone in order to commit the crime?

THE COURT:

Let me say this. We're getting a little bit away from voir dire. At this point here we're almost giving legal arguments in this case. I will, when the jury is selected and the case is argued and submitted, I will then instruct the jury as to the law. I will attempt to clear up any of these questions at that time... what specific intent is, where you find it, where you don't find it, is all contained in my instructions that I'll give to you.

MR. BLANCHE:

I am just really reading the law to you. I can't interpret it for you except when I get to argue to you at the end of this trial, but I'd like to ask each of you if you are selected as jurors in this case could you assure me that throughout this case and especially when you are

retired to go into the jury room and deliberate, could you promise me to be independent to maintain an open mind and could you promise me to go in there and discuss and debate each point that's been brought to your attention throughout this trial where the viewpoints are given, not only by the State of Louisiana, but from my viewpoint especially Ben Berry the fairest possible trial knowing the decision you may have to make at some later time; that is, at the end of this trial? Could you give me that guarantee?

A (Affirmative response from all jurors.)

THE COURT:

May I see the attorneys at the bench. Let's go off the record.

(Bench discussion.)

THE COURT:

Mr. Leitz.

MR. LEITZ:

Your Honor, the State will move to challenge Mr. Paul Marotte, Mr. Louis Donahue, Mr. Alcide Trudeaux and Doris Forges.

THE COURT:

Is that it, Mr. Leitz?

MR. KONRAD:

One of those was for cause, Your

Honor.

THE COURT:

I'll make sure the minutes are clear.

Mr. Blanche.

MR. BLANCHE:

Your Honor, would Mr. Leitz state the names of the individuals he's challenging one more time?

MR. LEITZ:

Paul Marotte, Louis Donahue, Alcide Trudeaux, Doris Forges.

MR. BLANCHE:

Your Honor, we challenge Mr. Tadlock, Miss Raymond... I think that's it.

THE COURT:

Is the panel acceptable to everyone?

Mr. Tadlock, Mr. Donahue, Mr. Trudeaux, Mr. Marotte, Miss Forges and Miss Raymond, would you go with Mr... would you go in the jury room, please. You're excused from this case. Thank you very much.

Would you swear in the panel of the jury?

(Helen Trigo, Jerral Andry, Harris Perry, Mildred Bishop, Elizabeth Bordelon and Elizabeth Allen were administered the oath to serve in this matter.)

THE COURT:

Mr. Clerk, call six more jurors.

THE CLERK:

Richard Tucker, Paul Plusquellec, Frances Sofia, Carolyn Larose, Dorothy Williams, Burtis Carter.

(Whereupon, the voir dire oath was administered.)

THE COURT:

Ladies and gentlemen, were you able to hear when I asked the questions to the preceding group of people seated in the jury box? I'll ask them again to you. Do you know anybody seated at the counsel table? Do you know anything at all about this case except what you may have heard here in the courtroom today? Do you have any preconceived...yes, sir?

A JUROR:

Yes, sir. I've heard of the case before and I'm pretty sure I know which one you're talking about.

THE COURT:

All right, sir. I'm sure it was in the paper. Do you have any preconceived ideas because of what you read in the papers?

A JUROR:

Yes, sir.

THE COURT:

Well, you have made up your mind already about the case?

A JUROR:

I know I was pretty upset about it. I have preconceived feelings about it. I might be swayed differently.

THE COURT:

Well, I'm not going to try to go into too much of your feelings at this time and I appreciate your candor because what we're looking for is honest answers. Do you feel that no matter what the evidence would be in this case that your mind is already made up as to what type of verdict you would render?

A JUROR:

Not necessarily.

THE COURT:

Well, let me say this: I don't want you to take this as argument on my part but as an explanation to you. The law says, and it's a time honored tradition and part of our legal heritage, that a defendant is presumed innocent until proven guilty. He is given the benefits of the doubt. He can only be convicted when the evidence is such that it would be beyond a reasonable doubt that the jury feels he's guilty. These are

safeguards for the life and liberties for our people.

With that could you not follow our law and apply that law to the facts that you would hear?

A JUROR:

Yes, sir.

THE COURT:

All right. Anybody else have...fine. Do you feel that you could sit here in this courtroom and listen to the evidence as it unfolds and apply that evidence to your mind along with the law that I will instruct you and come up with a fair verdict for either the State or the defendant, depending on how you feel after you've heard the evidence? Could you do that?

A (Affirmative response from all jurors.)

THE COURT:

Okay, I'll let the attorneys ask you some questions.

MR. KONRAD:

May it please the Court, ladies and gentlemen, including the prospective jurors in the box, I want to ask each of you a few of the questions that you've heard the other jurors asked which would give both defense counsel and Mr. Leitz

and I some general idea to your background which assists us in making decisions as to who would be the best jurors to sit in this case.

BY MR. KONRAD:

Q Mr. Tucker, how old are you, sir?

A Twenty-four.

Q Are you married?

A Yes.

Q Any children?

A No.

Q What is your occupation?

A Sports editor for the East Bank Guide.

Q How long have you been so employed?

A Two and a half years.

Q And you've lived in the Parish for how long?

A Sixteen years.

Q Mr. Plusquellec, how old are you?

A Thirty-seven.

Q Are you married?

A Yes, sir.

Q Any children?

A Three.

Q [illegible] old are they?

A Twelve, ten, eight.

Q Your occupation?

A I'm District Geologist for Texaco.

Q And you've been employed by Texaco for how long?

A Nine and a half years.

Q And you've lived in this Parish for how long?

A For the same amount of time.

Q Where are you from originally?

A West Virginia.

Q Thank you, sir.

Miss Sofie...

A I'm seventy years old.

Q Excuse me, seventy?

A Yes, sir.

Q Are you married?

A Yes and I have two daughters who one is married and one's not. I have three grandchildren and one great-grandchild.

Q Are you employed?

A No, I'm retired.

Q What did you do before you retired?

A I was a packer at Pennington Ford. I also worked at Elmer's Candy Company. They both went out of business.

Q How long have you lived in this Parish?

A Well, I've been thirty-three years in this Parish.

Q And where are you from originally?

A From New Orleans.

Q Miss Larose, how old are you, ma'am?

A Thirty-two.

Q Are you married?

A Yes.

Q Children?

A One.

Q And how old is that child?

A Ten.

Q Are you employed?

A Yes, I'm employed.

Q What is your occupation?

A At the Credit Department at Sears.

Q How long have you been so employed?

A Nine years.

Q How long have you lived in this Parish?

A All my life.

Q Miss Williams, how old are you, ma'am?

A I'm fifty-three.

Q Are you married?

A Yes, I am.

Q Children?

A Seven.

Q What are their ages?

A Well, they're twenty-nine through eighteen.

Q Are you employed outside of the home?

A At this time, no.

Q You have been in the past?

A Yes.

Q In what capacity?

A I'm a distributor for Van (spelled phonetically)
Beauty Concept.

Q It's an independent salesman type...

A (Inaudible response.)

Q Okay. How long have you lived in the Parish?

A Close to twenty-five years.

Q Are you originally from the New Orleans area?

A Right.

Q Mr. Carter, how old are you?

A Forty-three.

Q Excuse me?

A Forty-three.

Q Are you married?

A Yes, sir.

Q Children?

A Three.

Q And your occupation?

A I work for Maison Blanche.

Q Are you a salesman or ...

A I'm a drapery installer.

Q Drapery installer?

A Right.

Q And how long have you been so employed?

A Under three years.

Q And you've lived in this Parish for how long?

A Nine years.

Q Originally from this area or from out of town?

A From New Jersey.

Q From New Jersey?

A Right.

MR. KONRAD:

All of you, in general, have any of you ever had a member of your family that

has been personally charged with a serious crime?

A JUROR:

Yes, I've had one of my boys.

BY MR. KONRAD:

Q One of your children?

A Yes, sir.

Q Was that down here in this area?

A (Inaudible response.)

Q Was he convicted?

A Oh, no.

MR. KONRAD:

Have any of you ever been a victim of a crime, of a serious crime, or any member of your family?

A (Negative response from all jurors.)

Q Mr. Carter, as far as your experience that you have had with your son, do you think that would influence your ability to sit as a juror in this case today?

A No, sir.

MR. KONRAD:

Now you've heard explained to the previous panel the offense in which the defendant in this case is charged. He's charged with the crime called first degree murder in this State. First degree murder as passed by the legislature reads as follows: "First degree murder is the

killing of a human being when the offender has specific intent to kill or to inflict great bodily harm."

So, the simple definition that the legislature passed of first degree murder says that the elements of the crime would be: (1) the killing of a human being, that we have to prove that a human being was killed; (2) that the offender had the specific intent to kill or to at least cause great bodily harm to another person. Those are basically the two elements of first degree murder. What we have to prove is: (1) that there was a death; (2) that the offender actively intended that that death would result from his action, or that he at least intended to create or cause great bodily harm upon some person. Because of a recent case which was decided by our Supreme Court that Supreme Court then decided that in addition to finding those two elements and in order to find the defendant guilty of first degree murder that the jury then have to find one of the following facts in the circumstances existed. You first have to find the facts that I just set forth. Then, you have to find: (a) that the offender was engaged in the

perpetration or attempted perpetration of an aggravated rape, aggravated kidnapping, aggravated burglary, or armed robbery; (b) or that the victim was a fireman or peace officer engaged in his lawful duties ...a police officer; (c) the offender knowingly created a risk of death or great bodily harm to more than one person.

It's one of those three circumstances and, in fact, the State will submit that all three of those circumstances are present in the incident in this case. In addition to the specific intent, the defendant in this case was in fact engaged into what was an attempted armed robbery, a bank robbery. Second of all, the victim was, in fact, a police officer engaged in his lawful duties. Third, there was, in fact, more than one person put in danger or risk of death or great bodily harm.

This is the charge of the crime that the state is expected to prove. If we prove each of those elements, we will ask you that you find the defendant guilty as charged of the crime of first degree murder.

BY MR. KONRAD:

Q Do each of you new jurors understand what the State expects to prove Mr. Berry guilty of

of?

A (Inaudible response.)

MR. KONRAD:

If the State proves the defendant guilty of each of those elements so that you then find the defendant guilty of first degree murder, you will then be asked to go out again and to deliberate on the question of what should be done with Mr. Berry. That, of course, is then a decision for you to make as to whether the defendant should be convicted or should be sentenced to death, that is, to capital punishment, or whether he should be sentenced to life imprisonment. That's a separate deliberation for you ladies and gentlemen to make if you, in fact, convict him of the first degree murder.

Under certain circumstances, or if each of you feel that the circumstances warrant it that you could, in fact, return the death penalty to Mr. Berry...I'm not asking you to prejudge this case, I'm asking you if there's something about the death penalty which would make it impossible for you to return that verdict if, in fact, the facts warrant it?

BY MR. KONRAD:

Q Mr. Tucker?

A No.

Q Mr. Plusquellec?

A No.

Q Miss Sofia?

A No.

Q Miss Larose?

A No.

Q Do you, each of you, in fact, Mr. Williams and Mr. Carter, that if the fact warrant you could return such a verdict?

A (Inaudible response.)

THE COURT:

Did you wish to say something, sir?

A JUROR:

Yes, sir. I have a problem and you asked this of the last group at the beginning about "are we able to be sequestered". I have a problem because my wife is going out of town tomorrow with her brother to take care of their father. I have three children at home which would make it very difficult for me to be sequestered.

THE COURT:

You have three children, three small children?

A JUROR:

Yes, sir.

THE COURT:

Are you supposed to take care of them?

A JUROR:

Yes, sir.

THE COURT:

Well, gentlemen, do you have any problems in my excusing Mr. Plusquellec?

MR. KONRAD:

We have no objection.

MR. BLANCHE:

No objection.

THE COURT:

Under the circumstances we couldn't expect you to sit in the case and forget about your children. You'll be free to leave. You're excused, sir.

MR. KONRAD:

That was going to be a question.

BY MR. KONRAD:

Q Are there any circumstances, a particular health circumstance, or problem at home, or any other reason that no one has explored with you that would make it difficult for you to sit here for the next perhaps two days and give both the State and the defendant a fair trial and impartial trial in this matter?

Yes, Miss Larose?

A I have asthma and I couldn't give a 100%

guarantee that it wouldn't...

Q As far as you know now...

A Right now, I'm okay.

Q Okay.

THE COURT:

Well, that's why we get an alternate juror.

Q Is there any reason that any of you might know or maybe that you heard of the Judge, or the Assistant D.A., or the defense counsel going through with the previous panel, is there any reason that perhaps no one has discussed that would not allow you to give both the State and the defendant a fair and impartial trial in this matter?

A (Inaudible response.)

Q Each of you would feel that you could, in fact, do that?

A (Inaudible response.)

MR. KONRAD:

We tender the jurors.

BY MR. BLANCHE:

Q Mr. Tucker, were you -- did you hear most of the questions that I asked the panel before they sat?

A Yes.

Q Do you have any questions about the principles of law that I attempted to explain to the jury panel?

A No.

Q Do you have any preconceived attitudes about offenses that result in the death of another person; specifically, do you have an attitude that the only reasonable punishment should be death?

A No.

Q Miss Sofia?

A No.

Q Miss Larose?

A No.

Q Miss Williams?

A No.

Q Mr. Carter?

A No.

Q I'd like to know if all of you that in order to find Ben Berry guilty of first degree murder it would require you unanimous...it would require unanimity among all of you. All twelve of you would have to vote for that as opposed to the lesser included offenses that will also be within your power to vote for them. They are second degree murder and manslaughter. Do you understand that it requires unanimity, Mr. Tucker?

A Yes.

Q Miss Sofia?

A Yes.

Q Miss Larose?

A Yes.

Q Miss Williams?

A Yes.

Q Mr. Carter?

A Yes.

Q Additionally, and I would like for you just to signify by a nod with your head, do you also understand that once that first stage of this trial is completed, there will be a second stage called the sentencing phase of the trial. Once again, whatever determination that will be reached unanimously, all of you would have to agree that the appropriate sentence is death as opposed to natural life imprisonment. Do you understand that?

A (Affirmative response from all jurors.)

Q I'd like to ask you if you went into the jury room to deliberate could you be independent, could you have the capacity to abide by your convictions regardless of bargaining? Would it be impossible to sway you once you have formed an opinion based on the evidence?

MR. LEITE:

Your Honor, I'm going to object to that. I don't think that that's proper.

THE COURT:

Ladies and gentlemen, I will instruct you prior to your retiring to deliberate on what the jury's duty is in the jury room how you should hold to your own convictions unless your fellow jurors can convince you that your original position was wrong. You should not change your position just because you're outvoted or outnumbered if that's the way you really feel about the case. Hold to your convictions unless your fellow jurors can convince you that you're wrong. That is what Mr. Blanche is trying to get to.

MR. BLANCHE:

Correct. Thank you, Your Honor. The Judge phrased it better than I could.

BY MR. BLANCHE:

Q Mr. Tucker, did you understand his explanation?

A Yes.

Q Miss Sofia?

A Yes, I did.

Q Miss Larose?

A Yes.

Q Miss Williams?

A Yes.

Q Mr. Carter?

A Yes.

MR. BLANCHE:

Thank you.

THE COURT:

Go off the record.

(Off record.)

THE COURT:

All right. Mr. Leitz.

MR. LEITZ:

Your Honor, at this time the State will peremptory challenge Frances Sofia and Burtis Carter.

MR. BLANCHE:

I have no challenges, Your Honor.

THE COURT:

All right. Mr. Carter and Miss Sofia, thank you for being here. Would you go with this gentleman so he can get your phone number and your address. Thank you for being here.

Would you administer the jurors' oath.

(Richard Tucker, Carolyn Larose and Paul Pitre - ex foreman Dorothy Williams were administered the oath to serve in this matter.)

THE COURT:

Let's take a five minute recess.

(Recess.)

(Whereupon, the jury returned to the courtroom, in the custody of the Deputy Sheriff.)

THE COURT:

All right.

MR. LEITZ:

Do you want to go ahead and call the alternate at the same time you call this panel?

MR. BLANCHE:

It's all right with me.

THE COURT:

All right. The last person called who is selected will be the alternate.

Gentlemen, do you want to poll the jury or do you waive polling the jury?

MR. LEITZ:

The State will waive polling the jury.

MR. BLANCHE:

Defense waives polling of the jury.

THE COURT:

All right. Call four jurors. The last person called and who is selected will be the alternate.

THE CLERK:

Philip Ferrand, Charles Todaro, Frank Sherman, Sidney Forest.

THE COURT:

Would you administer the voir dire oath, Mr. Clerk.

(Whereupon, the voir dire oath was administered by the Clerk.)

THE COURT:

Gentlemen, I'm going to ask you some questions which are beginning to sound repetitious but I have to ask them and ask that you answer them.

Do you know anybody seated at the counsel table?

A (Negative response from jurors.)

THE COURT:

Do you know anything at all about this case except what you may have heard in the courtroom?

A (Negative response from jurors.)

THE COURT:

Do you have any reason to give to the court why you cannot sit here and listen to the evidence and apply the law as I will give it to you to that evidence and give the State and the defendant a fair trial? Could you do that?

A (Affirmative response from all jurors.)

THE COURT:

Okay. I'll let you answer Mr. Leitz's questions.

BY MR. LEITZ:

Q Mr. Ferrand, how old are you?

A Fifty-nine.

Q Are you married?

A Yes.

Q Any children?

A Three children and nine grandchildren.

Q What are the ages of your children?

A Thirty-one, thirty-three, and thirty-five.

Q Are you employed, sir?

A Yes, sir.

Q What do you do?

A Painter.

Q How long have you been a painter?

A Since 1942.

Q How long have you lived in Jefferson Parish?

A Oh, about twenty-eight years.

Q Have you or any member of your family ever been charged with a serious crime?

A Not my family. My in-laws.

C Would that have any effect on your decision here today?

A Oh, I don't know. You want me to tell you what he did?

Q That's okay. Would the fact that one of your in-laws was charged with something, would that have any bearing on your verdict here today?

A No, I don't think.

Q Mr. Todaro, how old are you?

A Twenty-two.

Q Are you married?

A Yes, sir.

Q Any children?

A Yes, two.

Q Are you employed, sir?

A Avondale Shipyard.

Q What do you do for Avondale?

A I'm a deckhand.

Q How long have you been employed by Avondale?

A Four years.

Q How long have you lived in the Parish?

A Twenty-two years.

Q Have you or any member of your family ever been charged with a serious crime?

A No.

Q Have you ever been a victim of a serious crime?

A Never.

Q Mr. Sherman, how old are you?

A Sixty-seven.

Q Are you married?

A Yes.

Q Any children?

A Four.

Q What are their ages?

A Twenty-seven to seventeen.

Q Are you employed, sir?

A I'm a retired accountant and administrator.

Q What were you employed by, sir.

A Lighthouse for the Blind.

Q How long were you with Lighthouse for the Blind?

A Twenty-eight years.

Q How long have you lived in Jefferson?

A Continuously for twenty-seven years.

Q Have you or any member of your family ever been charged with a serious crime?

A No.

Q Ever been a victim of a serious crime?

A No.

Q Mr. Forest, what is your age, sir?

A Sixty-five.

Q Married or single?

A Married. I have three kids...thirty...thirty-five, thirty and twenty-seven. I worked at Falstaff Brewery and am retired.

Q How long were you with Falstaff?

A Thirty years.

Q How long have you lived in the Parish?

A About thirty years.

Q Have you or any member of your family ever been charged with a serious crime?

A No.

Q Have you ever been a victim of a serious crime?

A No.

MR. LEITZ:

The people who have been called we're dealing here with a crime of first degree murder. The legislature has defined first degree murder as the killing of a human being when the offender has specific intent to kill or inflict great bodily harm. In order for you to come

back with the crime of first degree murder, there are certain circumstances with what the Supreme Court has required by your decision: (1) that the offender was engaged in the perpetration or attempted perpetration of an aggravated rape, aggravated kidnapping, aggravated burglary or armed robbery; the victim was a fireman or peace officer engaged in his lawful duties; thirdly, the offender knowingly created a risk of death or great bodily harm to more than one person.

If the State presents to you a case which falls in the grounds of the law as I just read it to you, do you think that you could not in this particular case but in any case present it to you in the following circumstances that we just read to you, could you come back with a death penalty?

A JUROR:

I couldn't.

Q Under any circumstances, could you come back with the death penalty?

A I could send him for life.

Q What about you, Mr. Ferrand?

A I could sentence him to life. I don't think you have a right to take someone else's life.

Q Under no circumstances whatsoever?

A No.

Q Mr. Todaro?

A Yes, sir.

Q You could come back with the death penalty?

A (Affirmative response.)

Q Mr. Forest?

A Do you mean Mr. Sherman?

Q I mean Mr. Sherman.

A Yes, I could.

Q You could come back with the death penalty.

A Correct.

MR. LEITZ:

Do you know of any reason why any of y'all could not give both the State and the defendant a fair trial?

A (Negative response from jurors.)

MR. LEITZ:

Is there any reasons for health or anything else why you could not serve on this jury and give both the State and the defendant your full attention for the entire time of this trial?

A (Negative response from jurors.)

MR. LEITZ:

I tender the panel.

MR. BLANCHE:

Gentlemen, the State of Louisiana through its legislature has determined that at lease in some circumstances certain

types of criminal behavior; like one, the death penalty. In that very same statute dealing with first degree murder they don't say that the death penalty as opposed to the penalty of natural life imprisonment is to be preferred one above the other. It's a decision that the legislature has determined to be made by you, taking into consideration not only the evidence but perhaps the entirety of your human experience.

You and Mr. Forest have both indicated that you just couldn't return or vote for it. Our law has developed so that if you make that statement and you're absolutely unequivocable and if you say with certainty that you couldn't even consider it...

MR. KONRAD:

Your Honor, I'm going to object to what I think Mr. Berry...I mean, Mr. Blanche, is leading into. He's telling them what the effect of making that statement is. I certainly think it's objectionable to tell the jury what that is.

THE COURT:

I'm not sure or unless you want to come up here and tell me something out of the presence of the jury but so far I

haven't grasped your meaning.

MR. KONRAD:

Could we approach the bench?

THE COURT:

Uh-huh.

(Bench discussion.)

BY MR. BLANCHE:

Q Mr. Ferrand, you don't know what evidence is going to be presented to you here in this case, do you?

A No.

Q I know I may sound like the prosecutor here but I want to ask you is there any circumstance do you think on a set of circumstances that resulted in another person's death that has caused some variety of homicide under our law where you could consider the imposition of the death penalty? You already said you could certainly sentence a man to prison for life but there are two possibilities in this statute. I'm asking you is there any possibility that you could consider the imposition of the death penalty?

A If I understood what you said correctly as a decision that the legislature can choose either one?

Q Sir, you as a juror...

A ...in other words, if I agree to the penalty,

I don't have to say he has to die. The legislation will have it on their chests to give that, is that right?

Q The legislature has said that if you find Ben Berry guilty, then you will have two things to consider at the sentencing phase; (1) Do you want to put him in prison for the rest of his life; (2) Do I want him to die?

All I need for you to say is if you would consider the imposition of that death penalty? I know you would consider the other half of that possibility.

A If what I say is considered means I would cause him to die?

Q It means that if you consider and decide that it was appropriate in this case, yes.

A All right. You said the legislature would take over and they would...

THE COURT:

Mr. Ferrand, let me clear up your mind.

The legislature has already passed this law. We're putting into application in this trial that part that we're talking about. When the case is submitted to you at the end of the trial, the jury will have two things to decide. The first thing is whether or not the defendant is

guilty of first degree murder. If they conclude he is, then they recess and go back and study again what to do with him. The choice is one of two things; either electrocution or life imprisonment. The jury, you have to make that decision, not the legislature. The legislature has already made its decision when it passed the law and passed it on down to us to administer. What the lawyer wants to know, what Mr. Blanche wants to know, is there any way, under any circumstances, you could consider the imposition of the death penalty...putting him to death?

A I don't want to take anybody's life. I don't want to be responsible for nobody's life.

MR. BLANCHE:

All right, thank you, sir.

THE COURT:

Mr. Ferrand, don't misunderstand, sir. We're trying to make you all...you're laymen, you're not lawyers...

A Would I be given the right to give the death penalty?

THE COURT:

You'd have to make that decision if you sat on this case.

A I don't want to take nobody's life.

THE COURT:

All right. We understand that and I want to make it clear that we don't expect you all to act like lawyers. You are laymen and these are complex terms. We are trying our best to explain to you in this short time...

A This isn't too much detail as it is.

THE COURT:

All right. We understand.

MR. BLANCHE:

We appreciate your candor.

BY MR. BLANCHE:

Q Mr. Forest?

A I feel the same way.

Q The same way.

A I couldn't take nobody's life.

Q But you could put them in prison...

A I could put them in prison. I couldn't take their life.

Q You couldn't even consider?

A I wouldn't. I'm telling the truth.

Q Yes, sir. I appreciate that.

Mr. Todaro, you indicated to Mr. Leitz that you certainly could consider the death penalty. Do you have any preconceived notions now and assume that conviction of first degree murder and I will plead that that is not necessarily the case because there are three possible

verdicts: first degree, second degree and manslaughter. Since you could consider the death penalty, do you think if the State proved first degree murder you would give it great consideration and it would be something you would be more likely to vote for rather than a sentence of natural life imprisonment?

MR. KONRAD:

Your Honor, I think that's an unfair question. How can you ask a juror what he would consider more than the other? The juror is called upon to make that decision when all of the facts are submitted.

THE COURT:

Well, let me instruct the juror first before and then I'll let him answer the question.

You'll be instructed to what you'll have to do when the case is submitted to you as a juror. By this time you are all getting a little bit more familiar with what the law and what we have in front of us here. The decision that is going to be up to the jury is: First of all, to come up with a verdict of one of the four possible verdicts you could come up with, either first degree murder, second degree murder, manslaughter, or not guilty.

Then if the jury should unanimously agree that he should be convicted to first degree murder, then you have another hearing, another decision to make, and that is whether or not to apply the death penalty or to give him life imprisonment.

Now, what he wants to know is if you do agree to first degree murder and that would be your verdict, would you then automatically feel that he had to go to the electric chair or would you give it consideration for the life sentence.

BY MR. BLANCHE:

Q So you don't have any...

A I would give it consideration.

Q ...set idea as to...

A No, I'm not to anyone's favor if that's what you mean.

Q Yes, sir.

Mr. Sherman, did you generally follow the gentleman I asked before?

A I believe that I have not made a decision that the death penalty could be automatic.

Q So then you would be free to consider either the two possibilities in the event of first degree murder?

A Yes.

Q Thank you, sir.

THE COURT:

All right. Mr. Leitz and Mr. Konrad.

MR. LEITZ:

Your Honor, we move to challenge Mr. Ferrand, Mr. Forest and the panel is acceptable.

MR. BLANCHE:

Could we approach the bench, please?

THE COURT:

Okay.

(Bench discussion.)

MR. BLANCHE:

Your Honor, we challenge Mr. Todaro and accept Mr. Sherman.

THE COURT:

Would Mr. Forest, Mr. Todaro, Mr. Ferrand, would you go and give your address, and Mr. Clerk, would you swear in Mr. Sherman.

(Frank Sherman was administered the oath to serve in this matter.)

THE COURT:

Let's call three jurors.

THE CLERK:

Luverne James, Helen McMillan, Elizabeth Buchanan.

(Whereupon, the voir dire was administered by the Clerk.)

THE COURT:

The last three ladies who were called, I'm going to ask you the same

questions I've asked the other jurors.

Do you know anybody involved in this case at the counsel table?

A (Negative response from jurors.)

THE COURT:

Do you know at all about this case except what you heard here today?

A JUROR:

I remember reading about it.

THE COURT:

Did your reading about it in the paper influence you that you feel you could not give both the State or the defendant a fair trial?

A JUROR:

No, sir.

THE COURT:

Do you feel that you could sit here and listen to the evidence and apply the law as I will instruct you to that evidence and decide the case based upon the law and the evidence fairly and impartially without regard to either side? Could you do that?

A (Affirmative response from jurors.)

THE COURT:

Answer the attorneys' questions.

BY MR. KONRAD:

Q Miss James, how old are you, ma'am?

A Forty-four.

Q Are you married?

A Yes, sir.

Q Any children?

A Three.

Q What are their ages?

A Twenty-two through fourteen.

Q Are you employed outside of the home, ma'am?

A Yes, sir.

Q What is your occupation?

A Secretary for the Parish.

Q Parish?

A Yes, sir.

Q What department of the Parish?

A Recreation.

Q How long have you worked for the Parish?

A A little over three and a half years.

Q How long have you lived in the Parish?

A Fifteen years.

Q Are you from the New Orleans area?

A I'm originally from Iowa.

Q Thank you.

Miss McMillan, how old are you?

A Forty-eight.

Q Are you married?

A Yes, sir.

Q Any children?

A Yes.

Q How many?

A Six.

Q What are their ages?

A Twenty-nine, twenty-seven, twenty-six, twenty-two, eighteen and nine.

Q Are you employed outside of the home?

A Yes. I'm secretary for my husband's construction company.

Q How long have you lived in the Parish?

A Twenty-one years.

Q Miss Buchanan, how old are you?

A Forty-two.

Q Married?

A Yes.

Q Any children?

A Two.

Q Their ages?

A Eighteen and sixteen.

Q Are you employed?

A Yes.

Q Where?

A Real estate.

Q As an agent?

A Yes.

Q With whom?

A Grady Harper.

Q How long have you worked?

A Four...five years.

Q How long have you lived in this Parish?

A Fourteen years.

Q To all three ladies generally: Has anyone in

your family or you ever been charged with a serious crime or ever been a victim of a serious crime?

A (Negative response from jurors.)

MR. KONRAD:

I presume that all three of you have heard the definition of the description of the crime which the defendant in this case is charged; that is, he's charged with the crime of first degree murder under that statute. First degree murder is the killing of a human being where the offender has specific intent to kill or to cause great bodily harm upon the victim. Those are basically the two elements of the crime which the State intends to prove against this defendant.

In addition to that, it is now our burden to prove certain aggravating circumstances, a set of circumstances in addition to that if you will find the defendant guilty of first degree murder as opposed to second degree murder. Those circumstances are that the offender at the time of the killing was engaged in the prepetration or the attempted prepetration of serving crime, including the crime of armed robbery. If you will find a specific intent to kill and together

with the death of the victim and you find that at the time the defendant was, in fact, engaged in the attempted prepetration of an armed robbery, those would then be the facts necessary to convict of first degree murder.

Now you can go to the second category of first degree murder, which is if you will find the victim, the person who was killed, was a fireman or peace officer engaged in his lawful duties at the time of his death.

You could find the third circumstance that the offender knowingly created a risk of death or great bodily harm to more than one person.

If you find the first two elements, that is, specific intent to kill and death, you can then find any one of the three other elements; either that that death was during the commission of an armed robbery, or attempted armed robbery, or that the victim was a law enforcement officer, or that more than one person was put in danger at the time that the death occurred.

Q Do all three of you understand the nature of the charges that the State intends to prove?

A (Affirmative response from jurors.)

MR. KONRAD:

In addition, as you've heard discussed quite a bit this afternoon, the State then calls upon you, or if you would find the defendant guilty of first degree murder, that it is up to the jury to decide the penalty. The penalty could either be: One, life imprisonment, or capital punishment...that is, the death penalty. The jurors would be expected to retire and deliberate on this second question given the event that the defendant was convicted of first degree murder.

BY MR. KONRAD:

Q Do each of you feel that you could, in fact, return the death penalty under appropriate circumstances, or are you so opposed to that as a penalty available under our law that you don't think you could ever return?

Miss James, do you think you could if the state does prove the appropriate facts you could return the death penalty?

A Yes.

Q Miss McMillan?

A (Negative response from juror.)

Q You're shaking your head so you don't think that regardless of what the State may think the defendant is guilty of that you simply have some moral conviction against

the imposition of the death penalty?

A Not the death penalty.

Q You couldn't return the death penalty under any circumstances that we prove?

A Not even if it was one of my own family.

Q Miss Buchanan, how do you feel about it?

A Yes, I could.

Q You think that you could return that verdict?

A Yes.

Q Is there any reason that would prevent any of the three of you from sitting here and giving the State and the defendant a fair and impartial trial?

Miss James?

A I would, sir.

Q Excuse me?

A I would. I've just recently been separated and I'm legally responsible for my fourteen year old.

Q You mean that you may be kept here for the next two days and that would be a hardship on you?

A It would due to the fact that at the present time I don't have anyone I could leave him with day or night.

MR. KONRAD:

Your Honor, we have no problems excusing her.

THE COURT:

All right. Finish your voir dire.

BY MR. KONRAD:

Q Miss Buchanan, is there any reason whatsoever that would prevent your giving the State and the defendant a fair trial?

A (Inaudible response.)

MR. KONRAD:

Thank you very much.

We tender the jurors, Your Honor.

BY MR. BLANCHE:

Q Miss Buchanan, if Ben Berry was found guilty of first degree murder, do you think that without going into the evidence you would tend to vote automatically for the imposition of the penalty of death?

A (Inaudible response.)

Q Have you understood as the result of the questions that were asked here today that a life sentence can be returned because of the evidence, no matter how slight or how great or how aggravating?

A (Affirmative response from juror.)

Q Do you understand that the death penalty in Louisiana is a real thing that if Ben Berry is convicted and sentenced to death that he will be electrocuted?

A Yes.

(Off record discussion.)

MR. LEITZ:

Your Honor, at this time we move to excuse Miss McMillan and I think by joint consent we'll excuse Miss James.

MR. BLANCHE:

That's correct.

MR. LEITZ:

The remaining is acceptable, Your Honor.

MR. BLANCHE:

We accept Mrs. Buchanan.

(Elizabeth Buchanan was administered the oath to serve in this matter.)

THE COURT:

Call two more jurors.

THE CLERK:

G. T. Rinaldi, Doris Muhl.

(Whereupon, the voir dire was administered by the Clerk.)

THE COURT:

Mr. Rinaldi and Miss Muhl, do you know anybody seated here at the counsel table?

A (Negative response from jurors.)

THE COURT:

Do you know anything at all about this case other than what you've heard here today?

A (Negative response from jurors.)

THE COURT:

Could you sit here and give both sides a fair trial after hearing the evidence from the witness stand and the law as I will instruct you?

A (Affirmative response from jurors.)

THE COURT:

Okay, answer Mr. Leitz's questions.

BY MR. LEITZ:

Q Mr. Rinaldi, how old are you?

A Twenty-nine, married, and two children...five and two and a half.

Q Are you employed?

A Yes.

Q Where?

A Mechanical Construction Company.

Q What do you do there?

A I'm manager of the Service Department.

Q How long have you been with Mechanical?

A About a year.

Q What did you do prior to that?

A I was project manager for another construction company.

Q How long have you lived in the Parish?

A About eight years.

Q Have you or any member of your family ever been charged with a serious crime?

A No.

Q Ever been a victim?

A No.

Q Miss Muhl, how old are you?
A Fifty-three.
Q Married?
A Yes. I have two children.
Q What are their ages?
A Thirty-four and thirty-two.
Q Are you employed outside of the home?
A Yes. I'm employed by the Jefferson Parish Public Utilities.
Q How long have you been so employed?
A Sixteen years.
Q How long have you been with the Parish?
A Thirty-nine years.
Q Have you or any member of your family ever been charged with a serious crime?
A No, sir.
Q Ever been a victim?
A No, sir.

MR. LEITZ:

Both of you heard previously when we defined what murder is in the aggravating circumstances necessary to come back with first degree murder.

BY MR. LEITZ:

Q Given a set of circumstances if we prove to you that there was a first degree murder and prove the aggravating circumstances, could you then come back with a death penalty?

A (Inaudible response.)

Q Do you know any reason why you can't give both the State and the defendant a fair trial?

A (Negative response from jurors.)

Q Do you know any reason why you can't stay here during the entire proceedings and give your full attention to what goes on in that witness stand and the law as it comes from the Judge?

A JUROR:

I will enter the hospital Sunday for tests.

Q As long as the trial ends before Sunday...

A Yes.

MR. LEITZ:

I have no further questions. I tender the panel.

BY MR. BLANCHE:

Q Mr. Rinaldi, do you understand that your respective of the evidence you were completely free once you go into that jury room to vote any way you want? Do you understand that?

MR. KONRAD:

Your Honor, I think you have to follow the law and the instructions of the Court. That's what your role is...to tell the jurors that he can vote any way he wants.

MR. BLANCHE:

I'll qualify that.

BY MR. BLANCHE:

Q Given the limitations imposed upon you by the Court, I will ask for specifically to the issue of guilt or innocence and, secondarily, to the issue of punishment being either the death penalty or life imprisonment. Do you understand that?

A Yes.

Q Miss Muhl?

A Yes.

Q Do you feel that you're commited to insure not the State but Ben Berry as fair a trial as possible?

A Yes, sir.

Q Miss Muhl?

A Yes.

Q Mr. Rinaldi, do you understand that the death penalty is now a reality in the State of Louisiana?

A Yes, sir.

Q Miss Muhl?

A Yes.

MR. BLANCHE:

Thank you.

MR. LEITZ:

Your Honor, we peremptorily challenge Miss Muhl. The panel is acceptable.

MR. BLANCHE:

We challenge Mr. Rinaldi.

THE COURT:

Mr. Rinaldi and Miss Muhl, would you go with this gentleman. Thank you very much. Call two more jurors.

THE CLERK:

Orelia Lyons, William Rhea.

(Whereupon, the voir dire was administered by the Clerk.)

THE COURT:

I'm going to ask you the same old questions. Do you know anybody seated at the counsel table?

A (Negative response from jurors.)

THE COURT:

Do you know anything at all about this case except what you heard here today?

A (Negative response from jurors.)

THE COURT:

Is there any reason why you could not sit here and give both the State and the defendant a fair trial based on the evidence and the law that will be given to you?

A (Negative response from jurors.)

THE COURT:

Answer Mr. Leitz's questions.

BY MR. KONRAD:

Q Miss Lyons, how old are you, ma'am?

A Forty-one.

Q Are you married?

A Yes.

Q Children?

A Three.

Q What are their ages?

A Twenty-four, twenty-five, and twenty-three.

Q Do you work?

A Yes.

Q What type of work?

A Cafeteria manager for Orleans Parish School Board.

Q How long have you been employed?

A Twelve years.

Q How long have you lived in this Parish?

A Thirteen years.

Q Are you originally from New Orleans?

A Yes.

Q Mr. Rhea, how old are you, sir?

A Fifty-seven.

Q Are you married?

A Yes. Two children. They're twenty-three and twenty-four.

Q And your occupation?

A Real estate appraisal.

Q Do you work for yourself?

A For Prudential Insurance Company.

Q How long have you been employed with Prudential?

A Thirty-one years.

Q And you've lived in this Parish for how long?

A Twenty-four.

Q Where are you from originally?

A Tennessee.

MR. KONRAD:

Has anyone of, anyone of your families ever been charged with a crime or ever been a victim of a serious crime?

A JUROR:

I had a brother.

Q Yes, Miss Lyons.

A I had a brother.

Q Was he a victim of a crime or charged with a crime?

A He was charged.

Q Do you feel that that would hinder your ability to serve as a fair and impartial juror in this case?

A No.

Q Would that in any way impair your ability to give the State and the defendant a fair trial?

A No.

MR. KONRAD:

Have both of you heard the many times that we've been over first degree murder and what its elements are and what you're called upon to decide as a juror in this case?

A (Affirmative response from jurors.)

MR. KONRAD:

Do you both understand the charge with what the defendant is charged?

A (Affirmative response from jurors.)

BY MR. KONRAD:

Q Miss Lyons, do you feel that you could return the death penalty if the State would prove all of the facts which it alleges in this case or under appropriate circumstances that you could return the death penalty?

A No.

Q Regardless of what the State may prove in this case you would not consider that as one of the verdicts that you might return in this case?

A No.

Q Mr. Rhea, how do you feel about the same question? Would you feel that at least the death penalty was an option available to you as a juror?

A Oh, yes.

Q That if the State would prove the appropriate facts that you could consider returning the death penalty?

A Yes, sir.

Q Do either one of you know of any reasons which would prevent you giving both the State and the defendant a fair trial?

A (Inaudible response.)

MR. KONRAD:

I tender the jurors.

BY MR. BLANCHE:

Q Miss Lyons, are there any circumstances wherein you could consider the imposition of the death penalty? I'm not referring to this case but could you conceive of a set of circumstances where it would be appropriate to do so?

A No. I just couldn't go with the death penalty for anyone.

Q Mr. Rhea, do you have a particular attitude about first degree murder? Do you think you understand pretty much what first degree murder is?

A Yes.

Q Do you have an attitude that would possibly compel you to vote for the death penalty that is required in first degree murder if proved?

A No, I don't think so.

Q You would have an open mind?

A Yes, sir.

Q You could consider that there might be in this case, assuming first degree murder... assuming that you go through the penalty phase...that life imprisonment would be appropriate as opposed to electrocution?

A Yes.

Q Do you promise me that you'll have an open mind on this case?

A Surely.

Q Are there any problems that would prevent you from serving on this jury?

A Not that I know of at all.

MR. BLANCHE:

Thank you.

(Bench discussion.)

MR. LEITZ:

The State will move to excuse Orelia Lyons. The panel was acceptable.

MR. BLANCHE:

The defense challenges Mr. Rhea.

THE COURT:

Folks, you can leave now. Thank you for coming. May I see the show of hands of how many jurors I have in the court-room? If there are any prospective jurors I want to see your hands so I can see how many I have left. One, two, three, four, five, six, seven, eight.

Let's call two jurors.

THE CLERK:

Georgia Willis, Viola Burks.

(Whereupon, the voir dire was administered by the Clerk.)

THE COURT:

Ladies, you've heard these questions before and I'm going to ask them again.

Do you know anybody at the counsel table?

A (Negative response from jurors.)

THE COURT:

Do you know anything at all about this case?

A (Negative response from jurors.)

THE COURT:

Do you have any preconceived ideas about this case?

A (Negative response from jurors.)

THE COURT:

Could you sit here and give both sides a fair trial?

A (Affirmative response from jurors.)

THE COURT:

Okay. Answer Mr. Leitz's questions.

BY MR. LEITZ:

Q Georgia, what is your age?

A Thirty-five.

Q Are you married?

A Yes.

Q Any children?

A Yes.

Q How many?

A Two.

Q What are their ages?

A Thirteen and eight. Thirteen and eight.

Q Are you employed outside of the home?
A Yes.
Q Where do you work?
A Belle Chasse State School for Retarded kids.
Q How long have you been there?
A Six years.
Q How long have you lived in the Parish?
A Thirty years.
Q Have you or any member of your family ever been charged with a serious crime?
A No.
Q Ever been a victim?
A No.
Q Viola, what is your age?
A Forty-one.
Q Are you married?
A Yes, I am.
Q Any children?
A No children.
Q Where are you employed, ma'am?
A Jefferson Parish School Board cafeteria manager.
Q How long have you been so employed?
A Eleven years.
Q How long have you lived in the Parish?
A Eleven years.
Q Have you or any member of your family ever been charged with a serious crime?
A No.
Q Have you ever been a victim?
A No.

Q Did you hear the definition of first degree murder and the aggravating circumstances?

A Yes.

Q Did you understand what they mean?

A Yes.

MR. LEITZ:

If the State were to prove that the defendant committed this murder and that there were aggravating circumstances, could you then consider the death penalty?

A JUROR:

Due to my religious beliefs, I could not consider the death penalty.

Q Under no circumstances?

A No.

Q You could consider the death penalty?

A Yes.

MR. LEITZ:

Do you have any reason that you know of why you could not sit on this jury and give both the State and the defendant a fair trial?

A (Negative response from jurors.)

MR. LEITZ:

I tender the jurors.

BY MR. BLANCHE:

Q Miss Burks, is there any way I could change your mind?

A No.

Q Miss Burks, you can't think of any situation?

A No.

Q Miss Willis, do you feel that you have any predispositions as to what would be appropriate in the event that the State proved that as a result of my client's act that someone died if the State proved to your satisfaction...proved all the elements of the crime without a reasonable doubt and it was first degree murder, which means that someone died as a result of this act, do you feel that you would lean automatically in favor of the death penalty or would you be able to give equial consideration to the two possibilites that are open to you in this case?

A I would be able to give equal considerations.

Q Would you promise me that you could have an open mind?

A Yes.

MR. BLANCHE:

Thank you.

(Bench discussion.)

MR. LEITZ:

Your Honor, the State would move to challenge both of them.

THE COURT:

Miss Burks and Miss Willis?

MR. LEITZ:

Yes, Your Honor.

THE COURT:

All right. Miss Willis and Miss Burks, thank you for coming.

MR. BLANCHE:

Your Honor, at this time I would like to make an objection...perhaps I should approach the bench.

THE COURT:

All right.

(Bench discussion.)

THE COURT:

For the record, Mr. Blanche, after our bench conference, we've agreed that your objection will be argued out of the presence of the jury but you're not waiving it by not being committed to argue it at this point.

MR. BLANCHE:

Yes, sir.

THE COURT:

All right. Two more jurors.

THE CLERK:

Frank Schiro, Daniel Dufrene.

(Whereupon, the voir dire was administered by the Clerk.)

THE COURT:

Gentlemen, do you know anyone seated at the counsel table?

A (Negative response from jurors.)

THE COURT:

Do you know anything at all about this trial except what you heard here today?

A (Negative response from jurors.)

THE COURT:

Do you have any reason why you cannot hear the evidence and the law as I will give it to you and give both sides a fair trial?

A JUROR:

Yes, sir.

THE COURT:

All right. Answer these gentlemen's questions.

BY MR. KONRAD:

Q Mr. Schiro, how old are you, sir?

A Forty-one.

Q Are you married?

A Married.

Q Children?

A Twenty-one, nineteen and nine months.

Q What is your occupation?

A I'm a mechanic.

Q With whom?

A (Indecipherable word) Construction.

Q Is that a general construction?

A Yes.

Q How long have you been employed?
A About five years.
Q Have you always done that type of work?
A Yes.
Q How long have you lived in the Parish?
A Eight years.
Q Where are you from originally?
A New Orleans.
Q Mr. Dufrene, how old are you?
A Thirty.
Q Married?
A Yes.
Q Children?
A (Inaudible response.)
Q And your occupation?
A (Inaudible response.)
Q Welding fabrications?
A Yes.
Q How long have you been employed by them?
A Six months.
Q Where were you employed before that?
A Delta Welding.
Q What did you do for them?
A I was an inspector.
Q How long have you lived in the Parish?
A (Inaudible response.)

MR. KONRAD:

Both of you have heard the definition of the crime of first degree murder that

was read to the previous panel?

A (Affirmative response from jurors.)

MR. KONRAD:

And both of you think you understand it?

A (Affirmative response from jurors.)

MR. KONRAD:

You both understand that one of the penalties that the jurors will be called upon to decide upon will be capital punishment or life imprisonment.. If you can find him guilty of first degree murder.

BY MR. KONRAD:

Q Mr. Schiro, could you feel that you could return the death penalty under the appropriate circumstances?

A No, sir.

Q Sir?

A No, sir.

Q Do you feel that under no circumstances and regardless of the facts that the State may prove in this case that you cannot return that penalty?

A No, sir.

Q You would not even consider that as one of the possible penalties?

A No.

Q Mr. Dufrene, how do you feel about the death penalty? I mean, do you think you could return it under the appropriate circumstance

A Under the appropriate circumstances.

MR. KONRAD:

Do either one of you know of any reason that will prevent either one of you from giving both the State and the defendant a fair and impartial trial?

A (Negative response from jurors.)

MR. KONRAD:

You know of no reason that would tender you or would make it difficult for you to give both the State and the defendant a fair trial?

A (Negative response from jurors.)

MR. KONRAD:

I tender the prospective jurors.

MR. BLANCHE:

I'm beginning to sound like a broken record. Is there any set circumstances that you could conceive of where you would consider the death penalty as appropriate?

A JUROR:

No, sir.

BY MR. BLANCHE:

Q Mr. Dufrene, you heard the definition of first degree murder?

A Yes.

Q Do you understand that if there's a conviction of first degree murder there are two possible penalties; they are life imprisonment

and the death penalty?

A Yes.

Q Do you also understand that the law is not favored one of those penalties over the other? They're both just there and it's up to you...it's up to all of these people...to decide which will be appropriate. One of the elements that will have to be proven of first or second degree murder is did Ben Berry have specific criminal intent to do what he did. I'd like to read it to you and ask you if you generally understand it. "Specific criminal intent is that state of mind which exists when the circumstances indicate that the offender actively desired and prescribed criminal consequence for this act or failure to act." Do you think you'd be able to apply this law as will be read to you by the Judge in connection with your deliberation?

A Yes.

THE COURT:

All right, gentlemen.

(Bench discussion.)

MR. LEITE:

The state will move to challenge Mr. Schiro. The panel is acceptable.

MR. BLANCHE:

We accept Mr. Dufrene.

THE COURT:

Mr. Schiro, thank you for coming.

Swear in Mr. Dufrene.

(Daniel Dufrene was administered the oath to serve in this matter.)

THE COURT:

Call one more juror.

THE CLERK.

Elmer Kinabrew.

(Whereupon, the voir dire was administered by the Clerk.)

THE COURT:

Gentlemen, if this juror is selected, will that be the alternate juror? Is that right?

MR. LEITZ:

That's right.

THE COURT:

Mr. Kinabrew, do you know anybody at the counsel table?

A (Negative response from juror.)

THE COURT:

Do you know anything at all about this case other than what you've heard here today?

A (Negative response from juror.)

THE COURT:

Do you have any reason why you cannot

give both sides a fair trial?

A (Negative response from juror.)

THE COURT:

All right. Answer these gentlemen's questions.

BY MR. LEITZ:

Q Elmer, how old are you?

A Sixty-one.

Q Are you married, sir?

A Yes.

Q Any children?

A No.

Q Are you employed, sir?

A No.

Q Retired?

A Yes.

Q What did you retire from?

A I was working for myself.

Q What kind of business?

A I was in the dairy farm business.

Q How many years have you lived in Jefferson parish?

A Thirty-six years.

Q Have you or any member of your family ever been charged with a serious crime?

A No.

Q Ever been a victim?

A No.

Q Mr. Kinabrew, did you hear us when we explained the definition of first degree murder was

and what the aggravating circumstances we need to prove?

A (Affirmative response from juror.)

Q If the State has proved all of the elements of the crime that is explained to you, would you then be able to come back with a death penalty?

A I'm afraid not.

Q Under any circumstances whatsoever?

A NO.

MR. LEITZ:

I tender the prospective juror.

MR. BLANCHE:

I have no questions. Thank you.

THE COURT:

You're excused, Mr. Kinabrew. Thank you for coming.

Call one more juror.

THE CLERK:

John Link.

(Whereupon, the voir dire was administered by the Clerk.)

THE COURT:

Mr. Link, do you know anybody at the counsel table?

A (Negative response from juror.)

THE COURT:

Do you know anything at all about this case?

A (Negative response from juror.)

THE COURT:

I mean other than what you've heard here in the courtroom?

A (Negative response from juror.)

THE COURT:

Do you have any reason why you cannot give both sides a fair trial after listening to the evidence and the law in this case?

A (Negative response from juror.)

THE COURT:

All right. Answer these gentlemen's questions.

BY MR. KONRAD:

Q How old are you?

A Twenty-four.

Q Married?

A Yes, sir.

Q Children?

A None.

Q How old is that child?

A I don't have any children.

Q I thought you said one. I'm sorry.

Where are you employed?

A Corco Incorporated.

Q What kind of business is that?

A Welding contractors.

Q What do you do? Are you a welder?

A Yes, sir.

Q How long have you been employed there?

A Ten months.

Q Who did you work for before that?

A Brown & Root.

Q Same type of work?

A Yes, sir.

Q How long have you lived in the Parish?

A All my life.

Q You heard all of the questions of the previous jurors concerning the nature of the crime in which the defendant is charged?

A Yes, sir.

Q You've also heard the fact that you could return the death penalty?

A Yes.

Q Could you return the death penalty if the facts proven by the State would warrant the death penalty?

A Yes, sir.

Q Do you know any reason whatsoever that may make it difficult for you to serve as the alternate juror?

A No, sir.

Q You understand that the alternate juror that you are to hear all of the facts and you will only deliberate with the rest of the jurors if something happens to one of them?

A Yes, sir.

MR. KONRAD:

I have no other questions.

BY MR. BLANCHE:

Q Mr. Link, in the event that one of the twelve jurors we've selected so far becomes ill or for some reason can't continue through the trial based on the principles that you've heard, could you give my client a fair trial?

A Yes, I could.

Q Could you (indecipherable word) the presumption of innocence?

A Depending on what the facts were.

Q Right. Will you require the State of Louisiana to prove to you every element of the offense charged beyond a reasonable doubt?

A Yes, sir.

MR. BLANCHE:

Thank you.

MR. LEITZ:

Mr. Link is acceptable to the State, Your Honor.

MR. BLANCHE:

He's acceptable.

THE COURT:

Swear in Mr. Link, please.

(John Link was administered the oath to serve in this matter.)

THE COURT:

Mr. Clerk, read the bill of indictment and the defendant's plea on arraignment.

THE CLERK:

September 15, 1978

Indictment filed, Deputy Clerk Carroll A. Marse.

No. 78-2151

The State of Louisiana vs. Benjamin A. Berry.

Indictment for first degree murder or R.S. 14:30, a true bill September 15, 1978. Charles Garrets, Foreman of the Grand Jury.

"The State of Louisiana, Parish of Jefferson, 24th Judicial District Court, Grand Jurors of the State of Louisiana, duly impaneled and sworn, in and for the body of the Parish of Jefferson in the name and by the authority of the said State, upon their oath, present: That one Benjamin A. Berry, late of the Parish of Jefferson on or about the 30th day of January in the year of our Lord, one thousand nine hundred and seventy-eight with force of arms, in the Parish of Jefferson aforesaid, and within the jurisdiction of the 24th Judicial District Court of Louisiana, in and for the Parish of

Jefferson aforesaid, then and there being committed first degree murder of Robert Cochran, contrary to the form of the statute of the State of Louisiana, in such case made and provided, and against the peace and dignity of the State. Signed, Patrick C. Leitz, Assistant District Attorney."

On September 22nd, 1978, defendants appeared in open Court represented by counsel and entered a plea of not guilty to the State charge.

THE COURT:

We're going to sequester the jury until 9:30 tomorrow morning. We'll arrange for transportation to take you to a nice restaurant and to a hotel. The four people who were selected just now, you might want to use the telephone to call your family.

Mr. Hartley, would you sequester the jury?

(Whereupon, the jury was sequestered in the custody of the Deputy Sheriff.)

THE COURT:

The fugitives from the law/averages who are still here in the courtroom who weren't selected, I'm going to ask that you give your name and phone number. There's a slight chance you might be called back but

very slim for another trial. You're excused from my courtroom for the balance of your jury term, and the only way you'd have to come is if there was some reason for another court that might need some jurors. I think the chances are slim and you're pretty well assured of not having to come back. Don't come back unless we call you. Thank you very much for being here.

For the record, counsel and the Court agreed to allow the reasons for the challenges to be done privately at the bench, but the court has permitted the challenges of Mr. Donahue, Mr. Forest, Mr. Ferrand, Miss McMillan, Miss Lyons, Miss Burks, and Mr. Schiro to be for cause in view of the Whitherspoon ruling. The other challenges were peremptory.

Do you have some motions you want to...

MR. BLANCHE:

Yes, sir. I just want to articulate the challenge that I have to the selection procedure used by the District Attorney's office for the record.

THE COURT:

All right, sir.

MR. BLANCHE:

First, that there was a systematic exclusion of blacks from the jury. It's been statistically shown that blacks are

less likely to vote for the death penalty than other identifiable segments in our society. Secondly, although I know it was in conformity with the law as it presently exists, we have a Whitherspoon qualified or death qualified jury, and I object specifically to the exclusion of those who voiced a conscientious opposition to the imposition of the death penalty. It deprives him of a cross section of the community and it's (indecipherable word) of his rights to due process clause of the Louisiana and United States Constitution.

THE COURT:

Do you wish to respond?

MR. LEITZ:

No, sir.

THE COURT:

All right. The State has thirteen peremptory challenges. The State can exercise them without any question being asked just as you can exercise thirteen peremptory challenges. Each side tries to pick the juror that they feel will serve their purposes best in the courtroom, and I found that the challenges made by the State, and the State incidentally challenged seven, I believe, that two of the ladies, Miss Burks, Miss Lyons, voiced

complete, total objection to the death penalty and indicated under no circumstances would they render a penalty of death in any case. Under the Whitherspoon ruling the Court has no alternative but to allow a challenge for cause. Unless the Whitherspoon ruling is overturned, I feel that the State's actions and the Court's ruling were within the confines of the existing law at this time. Accordingly, the motions are...I assume you're moving for a mistrial or you're voicing an objection just for the record?

MR. BLANCHE:

I'm objecting to the procedure and I suppose to sort of protect myself, I move for a mistrial.

THE COURT:

The court is going to deny the request for the reason stated. We'll recess until 9:30 tomorrow morning.

(Court recessed until 9:30 A.M. October 25, 1978.)

C E R T I F I C A T E

I, Gwen DeLatte, an OCR, do hereby confirm that the foregoing transcript is a true and correct copy of the matter heard on October 24, 1978, before the Honorable Frank V. Zaccaria, Judge, entitled, "State of Louisiana vs. Benjamin A. Berry", No. 78-2151.

Gwen DeLatte

Gwen DeLatte, OCR